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Volume III

The Ownership and Use of Personal Property

including

The Law of Patents, of Copyrights and Trade Marks; the General Principles of Contracts, and of Agency, Sale, and Warranty

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THE OWNERSHIP AND USE OF PERSONAL PROPERTY

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PERSONAL PROPERTY

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1. THE classification of property into real and personal is based wholly on the character or quality of the property itself. This is the chief distinguishing mark, but it is not infallible, for, under some conditions, land becomes personal property, and personal property is sometimes transformed into real. Thus, a tree, while standing, is real property; cut it down and convert it into furniture,

and it becomes personal property. Coal stored in the earth is real property; mine it, and its character is changed into personal property.

2. In like manner personal property may be changed into real. A familiar illustration are bricks and mortar, which are personal property when movable, but, fashioned into a house, become a part of it and thus a part of the land whereon it stands. Finally, the house may be pulled down; and then the materials that formed the structure return to their original quality as personal property.

3. It is important to understand the transitory or changeable nature, to the legal eye, of all property.

4. We have already defined land. All other property is personal. We shall now proceed to describe the various kinds of personal property, and the modes of acquiring absolute ownership thereof.

5. Animals are personal property, and the law classifies them as tame and wild, applying very different principles to the two classes. To the former belong horses, cattle, sheep and poultry. Of the names of the wild animals no mention need be made, but when they become domesticated, as they often do, through capture and taming, then some difficult questions arise concerning the time when their nature has been so transformed from wild, to domestic animals, as to require the application, respectively, of different legal principles.

6. In their natural state wild animals are not owned by anyone; a right to them can be acquired only by capture or possession. In like manner if, after their capture, they escape and return to their original state,

ownership in them immediately ceases. This rule is somewhat qualified, as will soon appear.

In order to acquire a right to wild animals they must be caught. To the hare especially this rule has long had a familiar application. Capture can be effected by means of traps, snares, and other deceptive arrangements, or by shooting. A wounded animal does not become the property of the hunter unless he follows up his advantage with reasonable diligence. In like manner the old Roman law declared that property in a wounded beast could not be acquired until the animal was actually taken.

When the killing or capturing is complete ownership in a wild animal is as perfect as ownership in a tame one, or in land, peanuts, or anything else. Thus, doves kept in a dovecote are domestic, and a person may be liable to indictment for stealing them. More generally, young animals that are tame, and practically within the dominion of the owner, belong to him, and the taking of them is a theft.

Whether the submission of a wild animal is so complete as to put him in the other class is a question of fact. If they run away, but return to their master, his ownership in them is preserved, notwithstanding their propensity to play the tramp. If, on the other hand, an animal of this kind should lose himself and return to the woods and show no disposition to return to his owner, another person would be justified in capturing him and asserting his ownership or in killing and devouring him.

7. An action lies against the owner of a ferocious

animal, dog, cat, or other beast, for injuries inflicted on one who is free from blame. It must be proved that the animal was vicious, and that the owner knew of his real character.[1] Animals that are known to be dangerous to mankind ought to be kept from doing injury; otherwise their owners will be responsible for the damage done by them to property or persons.

8. In applying this principle to damage done by a domestic animal it must be modified. To fasten a liability on the owner he must have seen or heard enough to convince a man of ordinary prudence of the animal's inclination to do injury. With notice to the owner of such propensity, he is liable for whatever damages may be done by his dog or other animal to any person, or to his property. The difference is inconsequential whether the animal committed the injury by reason of his viciousness and ferocity, or from good nature and playfulness—the intent of the animal is not material. The owner or keeper, having knowledge of his disposition or capacity

[1] "If a man have a beast that is of a wild nature, as a lion, a bear, a wolf if he get loose, and do harm to any person, the owner is liable to an action for damages, though he have no particular notice that he had done any such thing before. The same principle applies to damages done by domestic animals, except that as to them the owner must have seen or heard enough to convince a man of ordinary prudence of the animal's inclination to commit the class of injuries complained of. With notice to the owner of such propensity in the animal, he is liable for whatever damages may be suffered by any person of property therefrom. It makes no difference whether the animal was of cross and savage disposition, and committed the injury by reason of its viciousness and ferocity, or whether such injury resulted from good nature and playfulness—the intent of the animal is not material. The owner or keeper, having knowledge of its disposition to commit such injuries, must restrain it at his peril, and it is no answer to say that the animal was not cross or savage, and was in good nature and playfulness." Crowley v. Groonell, 73 Vt., 45.

to commit such injuries, must restrain the animal at his peril.[1]

9. Dogs partake of the character of both wild and domestic animals. By reason of their common use they have become the creatures of statutory regulation. Nowadays, almost everywhere the registry of dogs is required; even after this is done, they are not entirely within the control of their owners. Therefore one has a natural right to destroy a dog or other animal doing injury on his premises. Thus, a person has a natural right to defend a flock of sheep from the attack of a dog, and would be justified in killing him if need be to protect them. Unless the emergency is perilous, the more appropriate course is to drive off the unwelcome intruder, or to restrain him from doing damage.[2]

A collar worn by a dog and having a man's name thereon is evidence that he is the owner. But it is not conclusive evidence, and does not prevent the admission of other evidence to disprove ownership.

10. Herds of cattle on remote lands are usually branded by their owners. Cattle raised in this manner are subject to elaborate regulations.

11. Among other wild animals may be mentioned the busy bee. When hived they belong to the person

[1] In an action on a Kentucky statute providing that any person keeping dogs shall be liable to anyone injured by them, containing also the provision that no recovery shall be had in case the person injured is on the owner's premises after night, or engaged in an unlawful act in the daytime, the owner of a dog is liable for injuries inflicted on a person when he is in the owner's custody or in the custody of a kennel club on exhibition. Bush v. Wathen, 104 Ky., 548.

The owner of a vicious animal passing through a city street must restrain the beast from injuring anyone. 68 S. E. Rep., 764.

[2] See Chapter VI., § 13.

who captured them. If they afterward depart his right of ownership continues so long as they are within his ken. He also has a right to pursue and capture them, even though they should settle on a tree belonging to another. But he cannot gain title to bees when trespassing on the premises of another person.

12. Land-owners may forbid all others to enter on their premises for the purpose of hunting wild animals, and, after receiving such a notice, they are trespassers unless positive laws have been enacted to the contrary. In England, for many centuries, laws have existed enabling persons under various conditions to pass with the utmost freedom over the lands of others to engage in their sports of game. In this country our policy is very different, and hunters have less protection and regard. It is enough to say that after one has been forbidden to enter on the land of another, and is a trespasser, he cannot acquire any title to anything he may capture while thus acting as an intruder.

13. Any increase of domestic animals belongs to the owner of the dam or mother; hence, the owner of a cow is entitled to the calf, of the mare, to the foal, etc. This is in harmony with the Roman law, and is the rule everywhere.

CHAPTER II

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1. In the early days of our national government Congress enacted laws securing to inventors the fruits of their inventions. Any person who invents or discovers a new and useful art, machine, manufacture or composition of matter, or new and useful improvement of the same, may obtain therefor a patent.

2. Only a person who invented the thing patented or an assignee or representative of the legal inventor can lawfully obtain a patent. Consequently, a patent obtained by one or two or more joint inventors would not be valid. It is not true that the co-inventor invented the thing patented, but only assisted. If he could have a valid patent for the thing or process, each of his co-inventors would do likewise, and a strangely mixed interest would exist.

A patent obtained by several persons for an invention by one of them is void. Again, should several independent inventions be severally claimed in a joint patent, and one of these inventions be made by one of the joint applicants, the claim to the patent covering that invention would be void.

The law also provides that aliens who intend to become citizens may obtain patents as a reward for their inventive genius.

3. The word discovery in patent law does not have its broadest significance. By discovery is really meant

an invention. The same man may invent a machine, and discover an island, or a law of nature. For doing the first thing the law would grant to him a patent; it cannot grant him one for discovering an island or a natural law.

4. The statute provides for patenting four classes of things. They include an art, a machine, a manufacture, a composition of matter.

These inventions are the results of original thought, as distinguished clearly from a discovery of the laws of nature. A law of nature that is discovered may be utilised by means of an art or a machine, and this, not the discovery of the law itself, is rewarded by a patent.

5. In 1729 Stephen Gray discovered the electric current, and, in 1820, Oersted made the discovery that it would deflect a magnetic needle placed in its neighbourhood.[1] The discovery of this principle led Morse to invent the telegraph, and, in 1844, he embodied his invention in a working telegraph from Washington to Baltimore. In his application for a patent he made many claims, but the eighth claim was the most important—the use of an electric current for making intelligible signs at any distance. This claim was held to be void.

A person, therefore, cannot patent a principle, but only a process or mode of applying the principle. The difference may be illustrated by describing one or two inventions. A long time ago it was ascertained that cast iron when cooled suddenly is very hard and also very brittle. On the other hand, when cooling slowly it is soft and tough. In making a car wheel it was desir-

[1] Walker on Patents, p. 11.

able to form, if possible, a very hard periphery to endure a great strain; and a very tough centre. An invention appeared combining both ideas, a very hard rolling surface with a soft centre. It was ascertained that, in suddenly cooling the outside of the wheel, it contracted more rapidly than the parts that cooled slowly; and that, consequently, the wheel was very weak. About fifty years ago an inventor, Whitney, invented a mode of casting a wheel that combined both ideas perfectly. The Supreme Court declared that his patent for the process of making such a wheel was valid and, therefore, patentable.

One of the most familiar illustrations is the Bell telephone patent, a process for applying laws known before, but these applied in a peculiar manner.

There is a clear distinction between Morse's eighth claim and the claims of Whitney and Bell. Morse sought to obtain a patent for a single principle; the other inventors for a process or mode of applying a principle.

6. A patent for a process is a patent for a combination of all the laws of nature utilised by that process. A patent for a principle is a patent for one only of the laws of nature used in the process. "If a patent," says Walker, "for a principle were granted and sustained, it would be much broader than a patent for a process, because it would cover all processes which aim at the same result and which must use the particular law of nature covered by the patent for a principle, no matter in what combination with other laws. A patent for a process, on the other hand, covers only its own method of using all the laws of nature which it utilises. To grant and sustain a patent for a principle would induce an inventor to

guess which of the laws of nature used in his process will always be found indispensable, and guessing rightly, would enable him, by claiming that particular law to suppress all particular processes using it. . . . A patent for a process, on the contrary, leaves the field open to ingenious men to invent and use other processes using part of the laws used by the patented process, or using all of them in other combinations and methods."[1]

7. Machines and their improvements constitute the majority of American patents.

(*a*) A machine is a combination of improved mechanical parts adapted to receive motion and to apply it in producing some mechanical result. The parts of the machine may be old while the machine as a whole and also the subdivisions are proper subjects of a patent.

(*b*) An improvement may consist in an addition or a subtraction, or in substituting, for one or more of its parts, something different, or in so rearranging its parts as to make it work better than before. Whether or not a given improvement is patentable will depend on several considerations. First of all, it must be distinguished from an improvement in mere mechanical skill of construction. Again, it must not be an infringement on some other invention.

(*c*) The word manufacture includes everything made by the hand of man and also processes of manufacture.

8. The phrase, "composition of matter," covers all compositions of two or more substances. It includes, therefore, all composite articles resulting from chemical union or from mechanical mixture, whether gases,

[1] Walker, § 14, p. 10.

fluids, powders or solids.[1] To be a proper subject of a patent a composition of matter, like a process, a machine, or a manufacture, must be invented. It must also be novel and useful. These matters will be considered hereafter.

9. The distinction between a machine and a manufacture is not always clear, and the same thing may be said concerning a manufacture and a composition of matter. But an inventor whose invention belongs to one or the other of these three classes is entitled to a patent.

10. The law provides that any person who, by his own industry, genius, and expense, has invented and produced any new and original design for the printing of woolen, silk, cotton or other fabrics, any new and original impression, ornament, pattern, print, or picture to be printed, cast or otherwise placed on or worked into any article of manufacture, or any new, useful, and original shape or configuration of any article of manufacture, may obtain a patent therefor.

The law thus recognises the fact that some designs are useful as well as ornamental, while others have no utility except to please the eye of the beholder. It is questionable whether the framers of the constitution intended to provide patents for designs which are useful only because they are ornamental. In our age beauty is generally believed to have utility of its own, and patents are, therefore, granted and sustained for designs which are useful only because they are beautiful.

11. A distinction must be made between the invention

[1] Walker, § 18, p. 13.

of something of considerable importance and a slight development in a process of manufacture, etc. Justice Bradley has developed this idea with great clearness. He says that, in the development of manufactures, there is a constant demand for new appliances which the skill of ordinary workmen and engineers are adequate to devise. Each step in advance prepares the way for something more. If, to each slight advance, a patent was given, the consequences would be injurious to all. The design of the patent laws, he remarks, is to reward those who make some substantial discovery or invention which adds to our knowledge and makes a step in advance in the useful arts. Such inventors are worthy of all favour. It is not the object of these laws to grant a monopoly for every trifling device, every shadow of a shade of an idea which would naturally and spontaneously occur to any skilled machinist or operator in the ordinary process of manufacture. Were exclusive privileges granted for every little thing a pack of speculative schemers would arise and watch every advancing wave of improvement and gather its foam in the form of patented monopolies. Were they permitted to do this they would, in fact, lay a heavy tax on the industries of the country without contributing anything to its real advancement.

12. To distinguish between patentable manufactures and minor ones that are not, is not always easy. In some cases the discovered invention seems very slight, yet is very important, and, therefore, is patentable; in other cases, the invention is less important and not within the law. An interesting case may be given—that of a carbon

filament invented by Edison. The filaments used before Edison invented them had a diameter of one-thirty-second of an inch. Edison invented a carbon having a diameter of one-sixty-fourth of an inch. This seems a trifling thing, but the consequences were revolutionary. By the old filament, though lighting was possible, it was hardly practical. By the reduction of the diameter of the filament half the cost of lighting was saved. In other words, the invention of Edison, as an eminent writer has said, lies at the foundation of the incandescent electric lighting of the world. This invention, slight as it seemed in one sense, was clearly patentable.

Another illustration may be given—that of articles used to fill wood in order to give a solid surface. Formerly silicious clays were used, and someone ascertained that the use of powdered fine quartz or feldspar, mixed with oil, wrought greatly improved results. The opponents to this patent claimed that they were merely substitutes. The courts held otherwise, declaring that the use of these substances resulted in very different and greatly improved effects, and that their inventor was entitled to legal protection.

While it is not easy always to distinguish between a new thing that is important and patentable and something else also new, but less important because it may be the common knowledge of other persons, yet there are many negative rules for determining what is not patentable. One of these has already been foreshadowed, namely, that the products of mere mechanical skill cannot be secured by invention for the same reason that

excellency of workmanship is no invention, and, therefore, not entitled to a patent.

13. Again, the invention of substituting superior for other materials, in making one or more or all of the parts of a thing, is not an invention within the meaning of the law. The courts hold that an improvement must be the result of judgment and skill in the selection and adaptation of materials, and not merely the product of the inventive faculties of those who made them. So there is no invention in substituting superior for inferior materials. There is none in selecting from a number of materials the one best adapted to the purpose in view, and none in substituting one well-known form of a particular material for another well-known form of the same material. It is not an invention to improve a known structure by substituting a new equivalent for any of its parts.

14. It is not an invention to enlarge or strengthen a machine so that it will operate on larger materials than before. Nor is it an invention to change the degree of a thing or one feature of a thing. There have been numerous cases in which patents have been sought for changes or substitutions of one thing for another. Many of these have failed because they have not possessed the degree of inventiveness required by the law.

15. Aggregation is not invention. It is no invention to duplicate one or more of the parts of a machine, unless that duplication causes a new mode of operating the duplicated parts.

16. It is not invention to omit one or more parts of an

existing thing, unless that omission causes a new mode of operating the parts retained.

17. It is not invention to combine old devices into a new article without producing any new mode of operation.

18. Want of invention, if it already exists in a particular process or thing, can nearly always be detected by one or more of these rules. When a case arises to which none of them applies, and an uncertainty still remains, this may, perhaps, be removed by means of a rule lately prescribed by the highest federal tribunal. When the other facts in the case leave the invention in doubt, the fact that the device has gone into general use and is displacing other devices which had previously been employed for analogous uses is sufficient to turn the scale in favour of the existence of invention. The fact, however, that the device has been forced into extensive sale by judicious advertising and business energy is not proof of the superiority of invention.[1]

19. To change the form of a machine or manufacture is sometimes invention and sometimes not. When a change of form is within the domain of mere construction it is not invention; when it involves a change of mode of operation or function or results it is invention, unless this is held to be otherwise in pursuance of some other rule.

20. To change the proportions of a machine or manufacture will seldom or never amount to invention, but it may be invention to change the proportion of the ingredients of a chemical combination or of other compositions of matter.

21. Every inventor is presumed to have borrowed

[1] Smith v. Dental Vulcanite Co., 93 U. S., 495.

whatever he produces that was first actually invented and used in the United States, or was previously patented or described in a printed publication in any country.

22. It is not settled whether such an inquiry into the state of an art can include any foreign patent previously issued on an application of the same inventor, or an invention not enough like the invention covered by his later United States patent to make it true that that invention was first patented or caused to be patented in a foreign country.

23. Another element of patentability is novelty. Novelty is the name for newness, but that name does not indicate the foundation of the thing which it denotes. One of the ways of ascertaining novelty is to prove it from the negative side.

Novelty is not lacking by reason of prior knowledge and prior use in a foreign country, provided the patentee believed himself to be the first inventor, and provided, also, that the thing had not been patented elsewhere or described in a printed publication.

Novelty is not lacking by reason of the issue of any United States patent after the patented invention was made, though application for them was made before that event, nor by any private or prior patent granted in any foreign country, nor by any public patent granted in England unless it was sealed before the person obtaining the American patent made the invention.

Novelty is not lacking by reason of any prior patent or printed publication unless the information was full and precise enough to enable any person skilled in the art to

which it relates to make the process or thing covered by the patent sought to be anticipated.

Novelty is not lacking by reason of any prior abandoned application for a patent. This furnishes no evidence that any specimen of the thing described was ever made or used anywhere.

But evidence that the person who made an abandoned application also intended to carry his invention into practical use may be admitted to aid the court to determine the date and nature of the invention which the applicant sought to put into a working form. If it appears that his invention outside his abandoned application did not amount to enough to negative the novelty of a subsequent patent to a later inventor, then that abandoned application becomes immaterial.

Novelty is not lacking by reason of any successful application for a patent, or by any document pertaining thereto, other than the letters patent issued in pursuance of the same. When such an applicant has offered to prove the existence of something which is not shown by the letters patent themselves, the justice and propriety of the rule are apparent.

Novelty is not lacking by reason of any prior unpublished drawings, no matter how completely they may exhibit the patented invention. The same thing may be said of any patented model, no matter how it may coincide with the thing covered by the patent. Walker says, "The reason of this rule is not stated with fulness in either of the cases which support it, but that reason is deducible from the statute and from the nature of drawings and models."[1]

[1] Patents, § 60, p. 56.

Novelty is not lacking by anything not satisfactorily identical with the subject of the patent, even though the function of the prior thing was identical with the patented article.

Novelty of any design is not negatived by the fact that all of its features can be collected out of scattered prior designs.

Novelty is not negatived by anything incapable of the function of the thing covered by the patent, even though the character of the prior thing was chemically identical with the patented thing or mechanically similar to it.

Novelty is not negatived by the fact that every part of the patented thing is old. This rule springs from the doctrine which allows patents for new combinations of old devices. The whole is different from the sum of all its parts. If, however, a new assembling of old things amounts only to aggregation and not to combination—in other words, results in no new mode of operation—the patent will be void for want of invention, though not void for want of novelty.

Novelty is not negatived by any prior accidental production of the same thing without any knowledge on the part of the producer that has enabled him to repeat that production.

Novelty is not negatived by anything which was invented, patented or described in a printed publication prior to the granting of the patent in question or even prior to the application for the same.

Novelty is not negatived by anything which was neither designed, nor apparently adapted, nor actually used, to perform the function of the thing covered by a patent,

though it might have been made to perform that function by means not substantially different from that of the patented thing.

Novelty is lacking whenever there was prior knowledge by even a single person of use in this country of the thing patented. This rule applies even to cases where that knowledge of use was purposely kept secret, and it applies no matter how limited that use may have been.

Novelty is also lacking whenever there is evidence that even one specimen of the thing patented was made in this country prior to its invention by the patentee. This rule results through statute which provides that things, in order to be patentable, must not have been known or used by others in this country.

Novelty is lacking by proof of prior use where the invention was understood in point of method, though not correctly understood in point of result.

24. The question of the novelty of a design is to be determined by its comparative appearance in the eyes of average observers, and not in the eyes of experts making an analytical inspection.

25. Questions of novelty are questions of fact; therefore, to determine them an investigation is necessary, which is conducted in the same manner as all other investigations of a similar character.

26. The burden of proof of a want of novelty rests on him who avers it, and every reasonable doubt should be resolved against him. Novelty is lacking only by proof which puts the fact beyond a reasonable doubt.

27. The subject of the patent must possess something more than invention and novelty; the subject must be

useful. Utility is absent from all processes and devices that cannot be used to perform their specific functions, and patents for them are void. An illustration may be given. A patent covered the cylinder of a threshing machine that had rows of teeth inserted in its convex surface which revolved within a barrel having no teeth. The contrivance, therefore, was useless; nevertheless, a patent was granted. The patentee or some other person, by simply inserting rows of teeth in the outside surface of the barrel produced the useful threshing machine, which, superseding the ancient flail, is one of the most important of all agricultural machines. In such cases, says Chancellor Walworth, the patent is void if the machine will not answer the purpose for which it was intended without some additional alteration which the mechanic who is to construct it must introduce of his own invention, and which had not been indicated, or disclosed by the patentee at the time his patent was issued.[1]

If a device performs a good function, though but imperfectly, its utility is not negatived by the fact that it can be improved and made to operate better. Nor is its utility negatived by later superior inventions that have superseded the use of it. Indeed, patents are never held void for want of utility merely because they do their work poorly. In such cases no harm results to the public from the exclusive right, because few will use the invention.

Utility is not negatived by the fact that the manufacture covered by the patent has no function except to decorate the object to which it is to be attached. In this

[1] Burrall v. Jewett, 2 Paige, 143.

case utility resides in beauty. Whatever is beautiful in the eye of the patent law is useful, because beauty gives pleasure, and pleasure is the ultimate object of use in many things.

Utility is negatived if the function performed by the invention is injurious to morals, health, or the good order of society. An invention to improve the art of forgery, or to spread contagious disease, or to contaminate water, would be unpatentable.

Utility is negatived by the fact that the patented process or thing is injurious to the thing to which it is applicable, and also that the function performed by the patented part of the machine, though good in itself, is injurious to the utility of the machine as a whole.

28. An inventor may abandon an unsuccessful endeavour to make an invention; or, having made it, may abandon it to the public; or, having made an invention and applied for a patent, may abandon that application without abandoning the invention. Transactions of the first kind are called unsuccessful abandoned experiments. They confer no rights on those who make them and affect no rights of other persons.

Abandonment of an invention may be actual or constructive. It is actual when resulting from intention. That abandonment is constructive which is the result of some statute, regardless of the inventor's intention.

Actual abandonment occurs when there is an entire giving up of all intention of securing a patent. Such relinquishment may be shown by direct or other evidence. Of course, an inventor abandons his invention to the

public when he makes an express declaration to that effect.

29. An invention is a question of fact, and not of law. In applying this rule patents are not held void for want of invention unless it is clearly absent.

30. Every machine, before it can be used, must be constructed as well as invented. If one man does all the inventing and another all the constructing, the first is the sole inventor. If both participate in the inventing they are joint inventors regardless of the fact that both took part in the constructing.

31. To constitute a man an inventor he need not have skill enough to embody his invention in a working machine, model, or drawing. If he furnishes all the ideas needed to produce the invention he may avail himself of the mechanical skill of others to embody or represent his contrivance, and still be the sole inventor; but it is no invention to conceive a result and employ another to produce that result.

32. An application consists in doing several things: Depositing in the Patent Office a written petition to the Commissioner of Patents, and also written specifications of the invention with an oath to them; paying the Patent Office fee, in some cases; depositing a drawing; in others, a model; in others, specimens.

33. The petition is signed by the applicant and addressed to the Commissioner of Patents, stating the petitioner's name and residence, and requesting the grant of the patent for the invention therein designated. The petition must be signed by the inventor himself, and not by an assignee, though he may properly request that

the patent be issued to an assignee. An inventor who becomes insane, or dies before signing his petition, may act by his guardian in the one case, and by his executor or administrator in the other.

34. The specification consists of seven parts: The preamble; the general statement of the thing and object of the invention; a brief description of the drawings; a detailed description of the invention; the claim or claims put forth by the inventor; his signature; the signatures also of two witnesses.

The preamble states the name and residence of the inventor and the title of the invention, in order to connect the specifications with the petition.

The general statement of the nature and object is a mode of introducing the more elaborate description. The description of the drawings is a convenience in understanding them.

The detailed description of the invention must be full enough to enable any person skilled in the art or science to which the invention appertains to make or use it. If it be a machine, manufacture or compound, the description is ineffective unless it meets this requirement, and the patent, if granted, will be void.

The statute also says, in the case of a machine, that an applicant shall explain the principle and the best mode in which he has undertaken to apply that principle so as to distinguish it from other inventions. The object of this is to identify the invention.

The law does not mean that the inventor must explain the law of nature whereby his machine works, for, if it did, neither Morse nor Bell could have complied with the

requirement in describing the telegraph or telephone. The provision means that the essential characteristics of the machine shall be explained, and that the inventor shall state the mode which he regards to be the best.

35. The claim or claims must necessarily form a part of every specification. The statute says that "the applicant shall particularly point out and distinctly claim the part, improvement, or contribution which he claims as his invention or discovery." Says Walker: "The practice of the Patent Office has always been to require the claim or claims to be made in that particular part of the specification which immediately precedes the signatures. It is the practice of many solicitors of patents to write claims in vague phraseology, with the idea that vagueness is elasticity and elasticity is excellence. Such a practice is neither honest nor expedient. It is not honest, because it is sometimes intended, and always adapted, to defraud the public and to lead individuals into unintended infringements. It is not expedient, because dishonesty is bad policy in matters of patents and because vagueness of claims may make void a patent which would otherwise be valid."

An applicant whose description sets forth an entire machine may lawfully make a claim co-extensive with the description if the machine, as a whole, possesses novelty. Such a claim ought rarely to be the only one in a patent, because it can, in most cases, be readily evaded; the proper practice is to fix on the new parts or new combinations, and to make a separate claim for each of these parts and combinations. If the applicant desires he

can apply for and receive a separate patent for each of these parts and combinations.

A part of a machine claimed alone may be specified by the use of its name, when no other part of the machine has a similar name; but when the use of the name alone is not sufficiently specific to show what part of the machine is intended, that object can be accomplished by naming in the claim a reference letter or numeral to indicate that part in the description and in the drawings.

To a description that sets forth a manufacture there ought to be a separate claim for each of its patentable features. For, if there is but one claim covering all its features, those persons who infringe even the least of these incur a liability for making, using, or selling articles which contain all the others.

In a description relating to a composition of matter the claim should cover that composition in its entirety, and should, either expressly or by reference to the description, specify the different proportions the ingredients bear to each other. When some of the described ingredients may be left out the applicant, if he states that fact in the description, may have a separate claim for the composition of matter composed only of the residue, or he may have a single claim covering the indispensable ingredient whether with or without the others.

In a description relating to a process the claim should cover all the necessary occurrences in that process, and cover no more. If it covers less it will be void for want of utility; if it covers more it can be evaded by persons who omit any one if not necessary in using the others.

"Where the description and its accompanying drawing or photograph represent a design, the claim may identify its subject by a reference to that drawing or photograph. . . . A design-patent may contain a claim for an entire design with other claims for such of the parts of the design as are independently patentable. But several unconnected ornaments cannot lawfully be aggregated and claimed together in one claim."[1]

36. The signature of the applicant and of the witnesses must be in full and legibly written. The oath need not be in writing nor recorded, and the recital in the letters patent that the required oath was made to the application is conclusive evidence of the fact.

37. The oath to an application made by an executor or administrator of a deceased inventor may be so varied from the ordinary form as to meet his case; whether it is needful for him to swear that he believes the deceased inventor to be the first inventor, or believes that he was, in fact, the first inventor of the invention, is an unsettled question. If the first view be correct then an executor may, without perjuring himself, obtain a patent for an invention which he may know has been in previous use. If the second view be correct then he is cut off from such a practice.

38. The fee on applying for a patent for a process, machine, or manufacture, is $15, and there is a final fee of $20, payable after the patent is allowed and before its issue. The fees for patenting designs vary with the length of the terms for which the patents are sought. For a term of three and a half years the fee is $10; for

[1] Walker, § 120a, p. 104.

a period twice as long $15; for fourteen years $30; and the fees for design patents must be paid in advance. The final fees above mentioned must be paid within six months after allowance of the patent; a notice thereof is sent to the applicant or his agent; and if it is not paid within that time the patent is withheld.

39. Drawings are required to be furnished by the applicants for patents in all cases in which an invention may be thus illustrated. They must also be signed by the applicant and attested by two witnesses. The drawings must also show every feature of the invention covered by the claims. An invention consisting of the improvement of an old machine must show, in one or more views, the invention itself disconnected from the old structure, and also another view with so much only of the old structure as will show the connection of the invention with the same.

All drawings for letters patent must show the true position and proportion of the parts of the invention they purport to delineate; but they need not be accurate enough to be used as working drawings from which to construct specimens of these inventions.

40. A model of the invention must be furnished by the applicant in all cases admitting of such a representation, provided the Commissioner requires a model. Under the operation of the law of 1870, models are at present required by the Commissioner in very few cases which admit of representation in this manner.

41. Specimens of composition of matter and the ingredients are required by statute for such compositions in all cases whenever the Commissioner calls for them. In

fact, he always does call for at least a specimen of the composition, put up in proper form to be preserved, unless that composition is in its nature perishable.

42. An application for a patent dates from its filing in the Patent Office, and not from the date of its execution by the applicant. When an application is divided by filing a new one for a part of the old subject, the new one will date from the date of the old one. In the absence of other evidence, the date of an application for a particular patent is taken to be identical with the date of the letters patent itself.[1]

On granting several patents to one inventor for different inventions in the same art, the dates of their application, instead of the dates of the inventions themselves, determine their relative merits. In order to apply this rule, the date, if the invention covered by the patent is sought to be anticipated, must be fixed.

No invention ought to date from any day wherein it had no existence outside the mind of the inventor, no matter how complete may have been his mental conception of its character and mode of operation. Says Walker: "Mental conceptions are not useful inventions until they are so embodied that the world can use them after the death of the persons who conceived them. To allow inventions to take date from mental conceptions would strongly tempt inventors to commit perjury in order to appear to anticipate real anticipations of their patents."[2]

"Whether an oral description, given by an inventor to another, of a subsequently patented invention can

[1] Walker, § 129, p. 110.

[2] § 70, p. 65.

give that invention a date earlier than that to which it would otherwise be entitled, depends upon the nature of the invention and the capacity of the hearer to understand it and remember it."[1]

43. After making an application it is the Commissioner's duty to cause an examination to be made of the applicant's invention; and, if it appears that he is justly entitled to a patent, it is the Commissioner's duty to issue it. This examination may be made by an assistant designated for that purpose, the Commissioner having the right to overrule his decision.

The examination may extend to the knowledge of the invention and to any other question of fact on which the validity of the patent depends. Should an investigation of this question require the taking of testimony by the Commissioner, this must be taken in the form of depositions on notice to the applicant to appear and cross-examine the persons who are to testify.

While an application is pending the Commissioner has no authority to furnish a copy of any paper pertaining to it, except to the applicant or his attorney or agent. No patent official has any authority to give to any person information about a pending application, save to a very limited extent as prescribed by the rules of the Patent Office.

44. After rejecting an application for a patent it is the Commissioner's duty to notify the applicant, giving him the reasons for his action, together with such information as may be useful in judging of the propriety of amending his application, or altering his specification.

[1] Ibid.

If, after receiving such notice, the applicant persists in his request for a patent, with or without altering his specification, it becomes the Commissioner's duty to make a re-examination.

45. If the application is again rejected by the primary examiner the applicant may appeal to the Board of Examiners-in-Chief, and, if unsuccessful before them, may appeal to the Commissioner. The appeal may be heard by him, or by his assistants. If heard by the latter there is no appeal to the former, and no decision can be reopened or set aside by any successor, except for fraud, clerical error apparent on the face of the record, or newly discovered evidence presented under circumstances that would justify a new trial in an action at law. If the Commissioner or assistant commissioner refuse to grant him a patent the applicant may appeal to the Court of Appeals of the District of Columbia; and, if the Commissioner refuses to allow that appeal, he may be compelled to do so by a writ of mandamus, so called, granted by that court on the applicant's petition. All appeals must be heard on the case as submitted to the primary examiner. No appeal, therefore, should be taken until the application is in such a condition that the patent will issue if the decision of the primary examiner be reversed. If that decision is reversed by the Board of Examiners-in-Chief the primary examiner must pass the case for issue. If the Board affirms the primary examiner's decision the Commissioner will not reverse the Board on any question of fact, unless its decision was clearly against the weight of evidence. If the Commissioner affirms the decision of the Board he need

assign but one reason for that opinion; the applicant cannot demand of him that he pass upon any other question. The Commissioner may, at any time before the issue of the patent, reverse his own or any other favourable patent office action thereon, except that of his predecessor, or of the preceding assistant commissioner.

46. Any party aggrieved by the Commissioner's decision in any interference case may appeal to the Court of Appeals of the District of Columbia.

When an appeal is taken to the Court of Appeals the applicant is required to give notice to the Commissioner, and to file, in the Patent Office within such time as the Commissioner shall appoint, his specific reasons for appealing.

The Court of Appeals, therefore, is the final tribunal in all these cases. Often elaborate hearings are had before that body to determine the validity of applications.

47. The right to amend an application for a patent is one of great value. It is not expressly established by statute, though frequently exercised. The applicant may amend before or after the first rejection of his patent, and he may amend as often as the examiner presents any new reasons for rejection.

SUBDIVISION 2—COPYRIGHT AND TRADE-MARK

1. The right to copyright.
2. The statute.
3. Meaning of publication.
4. Meaning of a book.

5. Who is an author.
6. A copyright may be assigned.
7. Does copyright include an extension?
8. What is an infringement.
9. There must be a copy of all or of a material part.
10. Quotation.
11. Compilation.
12. Remedy.
13. Statutes concerning trade-mark.
14. Trade-mark defined.
15. Of what a trade-mark may consist
16. Legal test of a trade-mark.
17. A trade-mark is property.
18. Protection to aliens.
19. A trade-mark is the right of the manufacturer.
20. Novelty of a trade-mark.
21. Must be honestly used.
22. Duration of a trade-mark.
23. Who shall succeed original owner.
24. It may be assigned.
25. Infringement.
26. Must the deception be intentional?

1. Associated with patents is the law of copyright. The National Government secures to the writer or author his ideas as well as his inventions. Says Justice Yates in an old case: "Ideas are free, but, while the author confines them to his study, they are like birds in a cage which none but he can have a right to let fly. For, till he thinks proper to emancipate them, they are under his dominion." Every man has a right to his own sentiments. He has certainly a right to decide, if he will, to make

them public, or to use them only in the sight of his friends. In that sense a manuscript is peculiar property, and no man can take it from him and use it himself without violating the great law of property. And, as every author or proprietor of a manuscript has a right to determine whether he will publish it or not, he has a right to the first publication. Whoever, therefore, deprives him of that priority is guilty of manifest wrong.

2. The most important sections of the law of copyright are contained in the foot-note below. This describes

Rev. Stat., § 4952: "The author, inventor, designer or proprietor of any book, map, chart, dramatic or musical composition, engraving, cut, print, or photograph, or negative thereof, or of a painting, drawing, chromo, statue, statuary, and of models or designs intended to be perfected as works of the fine arts, and the executors, administrators or assigns of any such person shall, upon complying with the provisions of this chapter, have the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing and vending the same; and in the case of dramatic composition, of publicly performing or representing it or causing it to be performed or represented by others; and authors or their assigns shall have the exclusive right to dramatize and translate any of their works for which copyright shall have been obtained under the laws of the United States."

§ 4953: "Copyright shall be granted for the term of twenty-eight years from the time of recording the title thereof, in the manner hereinafter directed."

§ 4954: "The author, inventor, or designer, if he be still living, or his widow or children, if he be dead, shall have the same exclusive right continued for the further term of fourteen years, upon recording the title of the work or description of the articles so secured a second time, and complying with all other regulations in regard to original copyrights, within six months before the expiration of the first term; and such persons shall, within two months from the date of said removal, cause a copy of the record thereof to be published in one or more newspapers printed in the United States for the space of four weeks."

§ 4956: "No person shall be entitled to a copyright unless he shall, on or before the day of publication in this or any foreign country, deliver at the office of the Librarian of Congress, or deposit in the mail within the United States, addressed to the Librarian of Congress, at Washington, District of Columbia, a printed copy of the title of the book, map, chart, dramatic or musical composition, engraving, cut, print, photograph, or chromo, or a des-

the mode of procuring copyrights, of assigning them, what are infringements, etc.

On or before the day of publishfng a book, the proprietor of every copyright must mail two copies to the Librarian of Congress, at Washington. Failing to do this, a penalty may be imposed on him for neglecting the legal requirement. But the validity of a copyright is not affected by the failure of the proprietor to deliver the copies.

3. What is meant by publication? This would seem to be a simple question, but the law is full of difficulties, unseen on the surface. The delivery of a lecture to an

cription of the painting, drawing, statue, statuary, or a model or design for a work of the fine arts for which he desires a copyright, nor unless he shall also, not later than the day of the publication thereof in this or any foreign country, deliver at the office of the Librarian of Congress, at Washington, District of Columbia, or deposit in the mail within the United States, addressed to the Librarian of Congress, at Washington, District of Columbia, two copies of such copyright book, map, chart, dramatic or musical composition, engraving, chromo, cut, print, or photograph, or in case o a painting, drawing, statue, statuary, model, or design for a work of the fine arts, a photograph of the same: *Provided*, That in the case of a book, photograph, chromo, or lithograph, the two copies of the same required to be delivered or deposited as above shall be printed from type set within the limits of the United States,or from plates made therefrom, or from negatives, or drawings on stone made within the limits of the United States, or from transfers made therefrom."

§ 4957: "The Librarian of Congress shall record the name of such copyright book or other article, forthwith, in a book to be kept for that purpose, in the words following: 'Library of Congress, to wit: Be it remembered that on the — day of — Anno Domini, A. B., of ——, hath deposited in this office the title of a book (map, chart, or otherwise, as the case may be, or description of the article), the title or description of which is in the following words, to wit (here insert the title or description): the right whereof he claims as author (originator, or proprietor, as the case may be), in conformity with the Laws of the United States respecting copyrights. C. D., Librarian of Congress.' And he shall give a copy of the title or description, under the seal of the librarian of Congress, to the proprietor whenever he shall require it."

2 Fed. Stat. Annotated, p. 256 (1903).

audience is not a publication; nor is a book with a title-page containing the statement, "printed, not published," or "printed only for private circulation." In practice a book that is advertised is supposed to be published, for it is then offered to the public for a price. To give away a few copies is not a publication, and does not invalidate a copyright. To act or represent a play will not avoid a subsequent copyright.

4. A book means every volume or part of a volume, pamphlet, sheet of letter-press, or of music, or a map, chapter, or plan, separately published. If the work contains several volumes the insertion of the copyright in the first volume following the title-page is sufficient. But a newspaper price-current or label of an article offered for sale cannot be copyrighted.

5. Who is an author? Professor Parsons says: "If he uses only old materials in an old way, if he fills his books from other books without the addition of anything new from his own mind, he certainly is not an author. One may make a scrap-book by pasting on the blank leaves of a book interesting articles cut from newspapers, and such volumes might, if printed, have a certain attractiveness and value, but it would not be easy to regard the maker as an author, and yet a mere common-place book, like Southey's, for example, consisting solely of extracts, might be entitled to copyright on the ground of the care and labour or skill which had made so valuable a collection." The plan or system of a book, the classification and arrangement of topics may be so unique or important as to render it worthy of the protection of a copyright. Letters may be copyrighted, but an im-

moral, blasphemous, infamous, or otherwise illegal work is not entitled to a copyright. The English cases go further than our own in denying copyrights to works of this character. An artist employed by the Government on an exploring expedition, knowing that all his tracings were to be its property, had no copyright in them.

6. A copyright may be partly or wholly assigned. It should be recorded in the office of the Librarian of Congress, otherwise it will not be valid against a person who subsequently purchases without notice. An assignment of a copyright for a limited locality operates as a mere license. An author may assign his unpublished manuscript, and thus give to the assignee the exclusive right to take out a copyright. This may be done orally. In one of the cases a person agreed to furnish gratuitously notes and comments for a new edition of a copyright book; and the right to copyright this edition, with the notes and comments, vested immediately in the owners of the original work.

7. Does a general assignment of a copyright include the right to the extension of fourteen years, provided by the law? The better opinion is, the extension is not included in the assignment, but belongs to the original party; if, however, the instrument clearly shows that it was the intention of the assignor to transfer the right to any extension that might be granted, and he refuses to do so, he may be compelled by a court of equity.

8. An infringement may next be considered. It is difficult to lay down a general rule on this subject. Plagiarism is one thing; piracy another. Professor Parsons says: "Every writer must be permitted to use

sentiments, descriptions, definitions or expressions which, in their very nature, are common property, and therefore not subject to any exclusive right; and mere imitation is pardonable because, in a matter of copyright, as of patent, resemblance is not the question, but identity. And, on the other hand, every author is entitled to the fruits which the law permits him to reap from the fields which he has himself cultivated."[1]

9. An author's right is infringed only when other persons produce a satisfactory copy of the whole, or a material part of the book, or other thing covered by the copyright. A smaller production in a book of nine cartoons from *Punch*, with or without the descriptive writing, was held to be an appropriation of the substantial part of the proprietor's sheets of letter-press and an infringement of their copyright.

10. Rarely is a work reprinted with change, but an honest quotation from a book is not an infringement. If a book infringes the copyright of another book in a distinct particular, the remedy will not extend beyond the injury. Neither the intention of the party charged with the infringement, nor his ignorance of infringing, affects the matter. A translation may be infringed like an original book.

11. A compilation is not an infringement when it contains so much of original thought on the part of the compiler as to make his book essentially a new production. The answer is similar concerning an abridgement of a copyright book. Mr. Curtis, in his work on copyright, concludes that any abridgment whatever

[1] Vol. II., p. 330, Eighth Edition.

must be an infringement. Parsons says this is going too far. "Has the later author only made use of thoughts, or facts which the earlier author gave to the public in such wise as to produce by his own original efforts, a new book of his own?" This is the test that must be applied to such cases.

12. The remedy for infringing a copyright is generally an injunction. To be effective it must be perpetual. Usually the petitioner prays for an immediate injunction. This may be granted temporarily or be refused. In no case is a permanent injunction granted until after a full hearing on the merits of the complaint.

13. Passing to the subject of trade-marks, this is full of extremely difficult questions concerning their nature and the protection to which they are entitled. The more important part of the statute pertaining to the subject is given in a note.[1]

The act of March 3, 1881, provides: Sec. 1. "That owners of trade-marks used in commerce with foreign nations, or with the Indian tribes, provided such owners shall be domiciled in the United States, or located in any foreign country or tribes which by treaty, convention or law, affords similar privileges to citizens of the United States, may obtain registration of such trade-marks by complying with the following requirements:

First.—By causing to be recorded in the Patent Office a statement specifying name, domicile, location, and citizenship of the party applying; the class of merchandise and the particular description of goods comprised in such class to which the particular trade-mark has been appropriated; a description of the trade-mark itself, with facsimiles thereof, and a statement of the mode in which the same is applied and affixed to goods, and the length of time during which the trade-mark has been used.

Second.—By paying into the Treasury of the United States the sum of twenty-five dollars, and complying with such regulations as may be prescribed by the Commissioner of Patents."

Sec. 2. "That the application prescribed in the foregoing section must, in order to create any right whatever in favor of the party filing it, be accompanied by a written declaration verified by the person, or by a member of a

14. A trade-mark may be defined as the name or device used by a seller of goods to indicate that they are made by him, and that he has an exclusive right to sell them. His object in securing a trade-mark is to acquire the profits arising from the sale of the goods thus bearing a peculiar mark.

15. A trade-mark may be any device or symbol adopted by the owner. The essential thing is, its use to designate the true origin and ownership of the article to which it is affixed. It need not indicate any particular person as the maker of the article. Numerals may be thus arbitrarily used in combination with other devices. Also, the name of a place—as Akron cement—or pictures, symbols, or simply a word or words. Thus the word,

firm, or by an officer of a corporation applying to the effect that such party has at the time a right to the use of the trade-mark sought to be registered, and that no other person, firm, or corporation has the right to such use, either in the identical form or in any such near resemblance thereto as might be calculated to deceive; that such trade-mark is used in commerce with foreign nations or Indian tribes, as above indicated; and that the description and the facsimiles presented for registry truly represent the trade-mark sought to be registered."

Sec. 3. "That the time of the receipt of any such application shall be noted and recorded. But no alleged trade-mark shall be registered unless the same appear to be lawfully used as such by the applicant in foreign commerce or commerce with Indian tribes as above mentioned or is within the provisions of a treaty, convention, or declaration with a foreign power; nor which is merely the name of the applicant; nor which is identical with a registered or known trade-mark owned by another and appropriate to the same class of merchandise, or which so nearly resembles some other person's lawful trade-mark as to be likely to cause confusion or mistake in the mind of the public, or to deceive purchasers. In an application for registration the Commissioner of Patents shall decide the presumptive lawfulness of claim to the alleged trade-mark; and in any dispute between an applicant and a previous registrant, or between applicants, he shall follow, so far as the same may be applicable, the practice of courts of equity of the United States in analogous cases."

Sec. 5. "That a certificate of registry shall remain in force for thirty years from its date except in cases where the trade-mark is claimed for and

"Bethesda" applied to a spring, to indicate its origin and ownership, was held a valid trade-mark and entitled to protection.

16. The legal test of a trade-mark must always be, did the trade-mark itself ascribe the manufacture to him who used the mark. Perhaps the trade-mark would do this, perhaps this result might come from general knowledge through time. The safest course, so an eminent authority says, is to follow the custom which is now nearly, if not quite, universal—i. e., to connect with the mark a name or designation which should connect the thing bearing the mark with the name of him who uses it.

17. The exclusive right secured by a patent or copyright is regarded in law as property. As the same statute includes trade-marks, they also are property.

applied to articles not manufactured in this country; and in which it receives protection under the laws of a foreign country for a shorter period, in which case it shall cease to have any force in this country by virtue of this act at the time that such trade-mark ceases to be exclusive property elsewhere. At any time during the six months prior to the expiration of the term of thirty years such registrations may be renewed on the same terms, and for a like period."

Sec. 9. "That any person who shall procure the registry of a trade-mark, or of himself as the owner of a trade-mark or an entry respecting a trade-mark, in the office of the Commissioner of Patents, by a false or fraudulent representation or declaration, orally or in writing, or by any fraudulent means, shall be liable to pay any damages sustained in consequence thereof to the injured party, to be recovered in an action on the case."

Sec. 13. "That citizens and residents of this country wishing the protection of trade-marks in any foreign country, the laws of which require registration here as a condition precedent to getting such protection there, may register their trade-marks for that purpose as is above allowed to foreigners, and have certificate thereof from the Patent Office."

Act of Aug. 5, 1882. "That nothing contained" [in the above law] "shall prevent the registry of any lawful trade-mark right fully used by the applicant in foreign commerce or commerce with Indian tribes at the time of the passage of said act." 7 Fed. Stat. Annotated, p. 319 (1903)

18. Aliens, who "are entitled to the exclusive use of any lawful trade-mark, or who intend to adopt and use any trade-mark for exclusive use within the United States," are protected quite as effectually as our own citizens. By a recent statute the right is somewhat restricted—i. e., to countries affording similar privileges to citizens of the United States.

19. A trade-mark is essentially the right of the manufacturer only. From authority and practice, therefore, a seller can possess this right only from the manufacturer. If a glove manufacturer, for example, in Paris, has acquired an extensive reputation, and arranges for a merchant in New York to sell his gloves, he may have the right to call himself the exclusive importer. But this action would not prevent any person who could get these goods in Europe from bringing them here and selling them as the gloves of that manufacturer. But he would have no right to assume that he had an arrangement with the manufacturer, and was, therefore, his exclusive agent or representative in this country.

20. Questions sometimes arise concerning the degree of novelty required for a valid trade-mark. If the name has been long and commonly used to designate certain articles, no one could now claim an exclusive right to this name by making it his trade-mark. Parsons says the requirement of absolute novelty in a name or mark has not been pushed, and will not be so far as the needed novelty of a patented invention.

21. No man will be protected in the use of his trade-mark unless it be an honest mark and has been used honestly. Sometimes a man falsely inserts in

his trade-mark the word "patent." This is a legal offense.[1]

22. The statute provides that a trade-mark when duly recorded shall remain in force for thirty years, and may be extended on application for a similar period. It therefore contemplates the continuing of the mark beyond the life of the original proprietor.

23. Who shall succeed him? On this point the statute is silent. Should he have a son bearing his name, can he affix the trade-mark? It would be safer for him to record the trade-mark anew as his own. If the right was inherited it would go to all the heirs and next of kin, and be shared among them without reference to the question whether they made the article or not.

In one of the cases M had a recipe for a liniment, and gave it to the members of his family, permitting each to make and sell it with a label attached furnished by himself containing the words: "Old Dr. M's Celebrated Liniment" and other descriptive words, a vignette and the maker's address. Each member, including himself, confined his sales to a particular territory. After M's death his widow continued to make and sell on M's territory, using the same label. After a time she sold her material and outfit to one of M's sons. It was held that he had no right as against the other children, or the public generally, to make the liniment and use the label or M's name and description of the article.

24. A trade-mark may be assigned. The Commissioner of Patents is authorised to make rules and regulations

[1] For the protection it gives to the owner, see Section 2, Subdivision 8, § 10.

for its transfer. Not only may the seller agree that the buyer shall use the recognised trade-mark, but he may go further and agree not to use it himself.

Parsons says that trade-marks may be divided into two classes for the purpose of determining whether they may be transferred. The first is where the trade-mark declares that the article is made by a particular person or firm. This cannot be transferred. The second, where the mark is arbitrary or meaningless, and is only to indicate that the goods are made in a particular manner or possessing a particular excellence. This mark can be transferred.

25. The trade-mark may be infringed, it may be forged or imitated. The remedy in such cases is by injunction. But a court of equity will not restrain the use of a label on the ground of infringement unless the similitude is so great as to deceive purchasers who are not cautious. It is not necessary to show that anyone has been actually misled; and evidence of one sale of the imitation will justify an injunction. If the imitation be so close in its most salient and obvious features that the differences are only in subordinate and less noticeable characteristics, the law is violated. In one case the imitation consisted in the use of one word only. The remainder of the original trade-mark was quite different from the imitation; nevertheless an injunction was granted.

26. Must the deception be intentional, and, therefore, fraudulent? One may make goods and affix to them a mark indicating a peculiar merit without intending to deceive anyone concerning their manufacture. If the

deception be one in fact, though not in intention, the law will protect the rightful owner.

§2—By Contract

SUBDIVISION 1—INTRODUCTION

1. Definition.
2. Simple contracts and specialties.
3. Executory and executed contracts.
4. Express and implied contracts.

This is a very extensive subject; indeed, a large portion of the entire legal field might be covered by a complete statement of the law on this subject.

1. Let us begin with a definition. Chief Justice Marshall's has often been quoted: "A contract is an agreement to do, or not to do, a particular thing."

2. The most general division of contracts is into simple contracts and specialties. A specialty is in writing, to which a seal is added, after the name of each contracting party. A simple contract includes all kinds that are not thus sealed. They are often called parol contracts. In some cases the law requires the sealing of contracts, but more frequently contracts are either verbal or written without the addition of a seal. Formerly, when people could not write, much more attention was paid to the use of a seal than is paid at the present time. Nevertheless, there are some peculiarities relating to sealed contracts, especially in the way of evidence. For example, a cause or consideration for making a sealed contract need not be proved, because the law assumes that a consideration was given. A person who wishes

o enforce or compel another to perform a verbal or unsealed contract must show that there was a consideration for making it.

3. Another division is into executed and executory contracts. The terms clearly express their meaning. An executed contract is finished, completed, like a paid note;[1] an executory contract is still incomplete, like a note that is still running.

4. Another division is into express and implied contracts. An express contract is actually made in words or in writing; an implied contract is made by the law and is founded on justice. Thus, if A asks B to go and work in his field, and B goes and labours, though not a word is said about compensation, the law implies that B must be reasonably rewarded. Implied contracts are created under a great variety of conditions, as we shall shortly learn.

SUBDIVISION 2—PARTIES

1. Who is a minor or infant.
2. Classification of minors' contracts.
3. Contracts of a minor for necessaries.
4. What are voidable contracts.
5. Effect of a promise to pay afterward.

[1] "One's first impressions of a contract fully executed on both sides is, that it is ended, and no questions concerning it remain. But on reflection we see that the rights, relations, and responsibilities of the parties are changed, in degrees and ways differing with the varying circumstances. For example, property has been acquired or lost, a new executory contract has been created by the law, creditors have been invested with new rights . . . so that, though the contract is, in a sense, ended, in another and most important sense, it remains." Bishop on Contracts, § 80, p. 33.

6. If his contract is not avoided it remains in force.
7. Fraudulent contracts made by a minor.
8. He cannot bind himself when he has a parent or guardian.
9. He may, with his guardian's consent.
10. If he avoids his contract he can take no benefit from it.
11. Emancipation.
12. Contracts of married women.
13. Contracts of aliens.
14. Contracts of drunken persons.
15. Contracts of insane persons.

1. To every contract there are two or more parties, but not every person can be a legal party. Persons under twenty-one years of age cannot make them. In law they are infants or minors; and infancy disables them from making contracts, except for things needful to sustain their lives and health—in other words, for necessaries. In most states, infancy ends at the age of twenty-one; in some of them women are regarded as of full age at eighteen. A person becomes of age at the beginning of the day before his twenty-first birthday. The reason, though not a very sound one, is that the law, except in cases imperatively required by justice, does not recognise parts of a day. A person, therefore, born on the ninth of May in the year 1900, will become of age at the beginning of the eighth of May, 1921. If he were born at the beginning of the ninth, at the end of the eighth, twenty-one years afterward, he would have lived the full period of infancy. If he were born at the end

of the ninth, as he became twenty-one at the beginning of the eighth, two days, in truth, would be lacking to complete the full infantile period.

2. The contracts of minors may be divided into two classes: contracts for necessaries, and for other things. The rule making the first class binding on them is established for their benefit and protection. The obligation, however, is rather implied by law than arising by express contract. Consequently, only a reasonable price can be recovered for anything sold to a minor, whatever may have been the price fixed by the parties.

3. It is not always easy to distinguish between the things that are strictly necessary and other things. First of all, a thing may be regarded as necessary by one that would not be by another, depending on varying conditions of life. Usually, there has not been much difficulty in applying this rule of law. Necessaries include not only the things needful to support life, but such as are suitable to an infant's degree and estate; and the question, if disputed in a court of law, is a proper one for a jury to decide whether they were so or not, and whether they were furnished at reasonable prices. Cases are constantly arising in which minors seek to avoid their contracts, but, having had the benefit of them, are required by the law to fulfil them. Sometimes, when a minor's extravagance is clearly proved, and sellers must have known that his purchases were not needed, they have failed to collect their bills. One of these cases was decided long ago by Chief Justice Gibson.[1] The bill exceeded a thousand dollars, and included twelve coats,

[1] Johnson v. Lines, 6 Watts & Serg., 80.

seventeen vests, and twenty-three pairs of trousers, within fifteen months and twenty-one days, besides five canes, fur caps, chip hats and other things. The judge remarked that such a bill made him shudder, and yet the jury decided that the merchant could recover almost the whole of the amount. The judge said there was no reason for regarding such things as necessaries, and that it was the merchant's duty to know that the supplies were unexceptionable in quantity and kind, and that they were actually needed. When, for the purpose of relieving the minor, he assumed the business of guardian, he was bound to execute the duty as a prudent guardian would do, and, consequently, to make himself acquainted with the ward's necessities and circumstances.

4. Contracts for other things than necessaries are not absolutely void, but voidable. While they remain executory on the minor's part, he can disavow them at any time; after they have been fully executed he can disaffirm or ratify them as soon as he has attained his majority, or within a reasonable time afterward.

5. To ratify is not merely to acknowledge the contract. In some of the states a statute requires a new promise in writing and signed by the promisor, otherwise he is not liable.

The law does not require the use of any particular words or phrases for this purpose, but the description of the debt and the promise must be clear enough for the creditor to understand the promisor. It must also be made voluntarily and for the purpose of assuming a liability from which the adult knows that the law has

relieved him. If the promise be conditional the condition must be proved before the promise can be enforced.

6. A minor's contract which is not avoided remains in force. What is the effect of remaining silent? As a general rule, mere silence is not a confirmation, because a contract may be disaffirmed after the creditors' attempting to enforce it. But a minor may do many things from which a confirmation may be established. For example, should be buy property and, after reaching his majority, sell it, this would be a confirmation of his purchase. Generally, continued possession and use of a thing is evidence of confirmation. If he should buy a horse and give his note for the amount, he might, after attaining his majority, return the horse and refuse to pay the note. To retain the horse would be regarded as a confirmation of the note. The evidence of confirmation would be still stronger after a refusal to deliver the thing that could be redelivered.

A minor who borrows money for the purpose of spending it in purchasing necessaries, and gives his note for the amount, perhaps can avoid that, but he would be still liable for the debt. And he is also liable for money paid at his request for necessaries.

The strong tendency of the modern law is to regard all acts and contracts, and all transactions of minors as voidable only. The courts are now constantly declaring that these acts are not void, but voidable only, unless they are manifestly prejudicial.

7. To contracts of a fraudulent nature made by a minor a different rule applies. Suppose he is nearly twenty-one, and by misrepresentation concerning his age

obtains credit for a bill of goods. Can he afterward escape payment on the ground that he made no contract for them because he was not legally capable of contracting? This question has been presented to legal tribunals more than once for answer. While the contract cannot be enforced, because none exists which the law will recognise, the minor is liable in an action of deceit, and the damage he must pay is the value of the goods purchased. Thus, in another way, justice is done, and the law, declaring a minor's inability to make a contract, regarded.

8. A minor who has a guardian or parent cannot bind himself even for necessaries. Unable from want of sufficient discretion to judge what is best for himself, or to dispose of his property, his guardian or parent can act for him and protect him. This safeguard, though, would be of little worth could a third person deal directly with a minor and bind him by his contract. He would be left exposed to the consequences of his own foolishness, and to the craft of others.

Nor is a parent under any obligation to pay the debts of his child. And this rule extends even to those contracted for necessary food, clothing, and shelter. Shall a son be left to starve? No; the son must apply to the authorities, who will compel his father, if possessing the ability, to support him.

9. A minor may bind himself by a contract for necessaries, and also for things used in carrying on the business in which he is engaged, with the consent of his parent or guardian. On one occasion a guardian put his ward in possession of some land to cultivate, and furnished him

with a yoke of oxen for that purpose. "Did not this," so the court inquired, "imply an authority from the guardian to the minor to buy a plow and harrow, and to hire additional labour to make hay and gather his harvest, which he could not do alone?" And the question was answered in the affirmative.

10. A minor who avoids a contract can retain no benefit from it. Thus, if he contracts to sell a thing and refuses to deliver it, he cannot demand the price; or, if he contracted to buy a thing and refuses to pay the price, he cannot demand the thing purchased.

11. A parent may endow his minor son with the right to make a contract to serve another and to retain the reward he is to receive. This is called emancipation. Not infrequently the father claims the reward on the ground that he has not emancipated his son. This inquiry, when conducted by a judicial tribunal, is chiefly one of fact. An eminent jurist long ago declared: "We go so far as to say that, when a minor son makes a contract for his services on his own account, and the father knows of it and makes no objection, there is an implied assent that the son shall have his earnings."[1]

Again, should a minor make a contract for his service, with his father's consent, he could disaffirm it at any time and claim, nevertheless, a reasonable sum for what he had done. Suppose he had agreed to work for another for a year, and, after working six months, should learn that he could earn more from another employer. He

[1] Parker, Ch. J., Whiting v. Earle, 3 Pick, 201. Approved in Atkins v. Sherbins, N. Eng. Rep. (Vt.), 482, June, 1886.

could rescind his contract and recover the worth of his labour for the period he served.

Lastly, his emancipation does not have the effect of transforming his voidable contracts into binding obligations. He can still take advantage of his infancy. The effect of his emancipation, therefore, is simply to release him from his parents' control with respect to making a contract for his services and retaining his earnings.

12. Another class of persons who are not perfectly free to contract are married women. By the common law a married woman had very little authority to make contracts. The law gave all the personal property she had to her husband, rendered him liable for all her debts, and shielded her from any engagements she might make. By statute, in all of the states, her authority to make contracts has been greatly enlarged. In general these statutes give her authority to sign notes and other obligations, and to engage in business, buy and sell real estate and other property, almost as freely as if she was unmarried. Some restrictions remain in selling real estate, and in becoming responsible for the debts of her husband and others. As the statutes of each state differ in some way, and are limited in their operation to the state enacting them, they are not given here.[1]

13. Other persons who are not always free to make contracts are aliens. By the common law they had no authority to own or hold real estate, nor could they give a good title to it by contract, or transmit a good title to their heirs. But their disabilities have been removed in

[1] See Vol. VI., Chap. I., Sec. 3.

all the states by statute, so that they can own property and make contracts like other persons.

14. Two other classes may be mentioned who are incapable, to a considerable degree, of making contracts —drunken people and persons who are insane. By the old rule of law a man who made a contract when in a state of intoxication was liable; his intoxication was no excuse or defense. But this principle has long since given way to one more in harmony with justice. A person who is so destitute of reason as not to know the consequences of his contract, even though this state of mind was produced by intoxication, is not obliged to fulfil or execute it.

To this rule a negotiable note taken by a third person without any knowledge of the maker's drunkenness is an exception, which is made for the protection of the paper. In all other cases the above rule now applies.

15. A different rule applies to the contracts of an insane man. Like a person who has not attained his majority, he is liable on a contract for the necessaries of life that he has received, and he would also be for merchandise innocently furnished on his order by a person who did not know of his infirmity. Insanity is a permanent state or condition of the mind that disables one from taking care of himself; drunkenness is a temporary disability that is voluntarily produced. Insanity is a misfortune; drunkenness is a vice. No man voluntarily does an act necessarily producing madness in order that he may become insane, but men drink that they may become drunk; and, when they thus deprive themselves of the use of their reason and voluntarily expose them-

selves to fraud, the law wisely refuses to treat them with the same tenderness as those unfortunate beings who are deprived of their understanding.

SUBDIVISION 3—CONSIDERATION

1. There must be a cause or consideration for a contract.
2. Meaning of consideration.
3. A consideration need not be adequate.
4. A promise to pay another's debt without consideration is invalid.
5. An agreement to accept part of a debt for the whole is void.
6. Mutual fraud is a consideration.
7. An illegal consideration cannot sustain a contract.
8. The legal part of a divisible consideration can be enforced.
9. The compromise of a criminal charge is not a valid consideration.
10. Work or service is a consideration for a promise to pay for it.
11. The worth of a part of an agreed service can be recovered.
12. There can be no recovery for a voluntary service.
13. A promise is a good cause or consideration for a promise.
14. A contract which cannot possibly be performed cannot be enforced.
15. A contract resting on a consideration that has wholly failed cannot be enforced.
16. Illustration of the principle.

17. The consideration for changes in building contracts.
18. Though a consideration be needed, proof may sometimes be omitted.
19. When a moral obligation to pay is sufficient.
20. A contract may be modified without a new consideration.

1. There must be a cause or consideration for every contract. In other words, the law will not regard a person as having made a promise without a cause or consideration. A promise is not made for nothing. A negotiation or undertaking without a consideration is a naked bargain; and the promisor, even though admitting his promise, is under no legal requirement to perform it. In no case can a person be required to fulfil a promise or contract that is not based on a consideration.

2. The word consideration has a peculiar meaning. It denotes some substantial cause for the promise. This cause may be one of two things—i. e., either a benefit to the promisor or an injury or loss to the promisee in consequence of the promisor's conduct or request. Thus, if A simply promises B to pay him a thousand dollars in three months, the promise is worthless in law, even if in writing, for the promise is merely voluntary and is without any consideration. Why should A make such a promise; what does he get for it? Nothing. As nothing is received or expected, the law protects him—even though he is so foolish as to make such a promise—against B's attempt to enforce it. But a very slight advantage to one party, or a trifling inconvenience to the other, is a sufficient consideration to sustain a contract.

To the above definition a fuller one may be given. Says Lawson: "A consideration which will support a simple contract is some right, interest, profit, or benefit, accruing to one party, or some forbearance, detriment, loss, or responsibility, given, suffered or undertaken by the other."

3. A consideration need not be adequate. A court will not inquire into the exact proportion between the value of a consideration and that of the thing to be done or given in exchange. But it must have some real value, and, though this be very small, this circumstance may, even by itself, and still more when strengthened by other facts, imply or sustain a charge of fraud. Again, courts will sometimes not require the fulfilment of contracts that are without fraud, and will give only reasonable damages to the person who seeks compensation from the other in consequence of his failure to execute his undertaking.

Anson has presented forcefully another view of consideration worthy of notice. It is *evidence* of a contract. From this point of view adequacy plays a subordinate part.

4. The way is now prepared for inquiring what classes of contracts rest on a valid consideration. As a voluntary undertaking for which no consideration is to be received cannot be enforced, so, a promise to pay, without consideration, the debt of another is of this character, and void. A promissory note, therefore, given by a widow for a sum due to her husband's creditor, is without consideration and cannot be recovered. Why should she pay it? She has received nothing.

5. An agreement without consideration between a debtor and a creditor to accept, at a future time, a part of a debt for the whole, is void. Of course, an actual acceptance of a part of the money due from a debtor in discharge of the whole amount, would be a lawful and binding transaction.[1] But an agreement to accept, at a future time, a part for the whole is of a different character. Why should the creditor give up a portion of his debt for nothing? To this rule there are many exceptions; for example, when the amount of the claim is disputed, or where mutual unsettled demands exist, or when the creditor receives some new benefit or advantage. A promise to accept less than the full amount of a doubtful claim is always valid.

An illustration of practical value may be added. A sued B and C. Before the trial of the case A released C in writing in these words: "I hereby release C from all individual liability for the claim upon which the suit against B and C is based, so that, if I fail in recovering judgment against B, C is released from all liability." A failed to recover against B, and then brought a suit against C, who interposed this release as a defence. It was ineffectual because it had been made without any consideration.[2]

[1]The rule has been often declared that the payment of a smaller sum in satisfaction of a larger is not a good discharge of a sound, collectible debt, for it is no consideration for a promise to forego the residue. But, as Lawson says, this is a harsh rule, and the "courts seize on any circumstance" to take a case out of its operation. Consequently, the exceptions are so numerous as "to make the rule itself more shadow than substance." American Law of Contracts, § 104, p. 116.

[2]If A had added a seal to his signature the writing would have been effective.

6. A note procured by fraud is generally worthless, and the door of justice is shut against its collection; but the mutual fraud of the parties to a note is a binding consideration. Says an eminent jurist: "It is not the province of the law to help a rogue out of his toils. The rule is to leave the parties where it finds them." Thus, A, who feared bankruptcy, for the purpose of defrauding his creditors, gave his property to his brother B, taking four notes from him. As the transaction was a mutual fraud, B could not have escaped had A demanded the payment of either of the notes. As B could not set up his own fraud as a defence against the person to whom they were payable, neither could he make this defence against a bank that had taken one of them as security for a debt.

7. As the law does not recognise an illegal consideration, it cannot sustain a contract. It enters directly into the instrument and destroys its validity, because the law will not permit itself to be violated with impunity. For this reason a promissory note given in a gambling transaction in a state where gaming is a statutory offense is void, though it is negotiable in form and is transferred to an innocent holder or owner, who has given therefor value or money. Were such a note collectible by a third party the law which declares all gambling transactions void could be defeated. For the same reason a promissory note given to a broker to cover losses incurred in a stock-gambling transaction is void in all the states where such a contract is regarded as a wager.[1]

[1] Harper v. Young, 112 Pa., 418; Unger v. Boas, 13 Pa., 601; Daniel on Neg. Instruments, § 806–808, p. 804 (Fifth Edition).

8. If the consideration for a contract is partly legal and partly illegal, and no separation of the parts can be made, there can be no recovery of any part; but, if there are several distinct considerations, some of which are legal and some not, the legal portion may be recovered. Thus, no one could once recover in Pennsylvania on a note given for a tavern reckoning exceeding twenty shillings, but if other legal items of account entered into the consideration these might be the subject of a legal recovery.[1]

9. The compromise of a criminal charge of a public nature is not a valid consideration for a contract. As an eminent English judge long ago remarked: "You shall not stipulate for iniquity." The reason is clearly one of public policy. Such a compromise ought never to be made, but often is for the sake of recovering a part of the loss.[2] Not infrequently a thief makes such a compromise, agreeing to return a part of the money, or the thing he has taken, provided that no prosecution shall be begun against him. The law is less strict on this subject than formerly and to some extent has been changed by statute. For example, a note given in settlement of a criminal prosecution for obtaining money or goods by false pretenses may now, by statute,[3] be enforced. But the promise of a payee of a note not to prosecute the

[1] Yundt v. Roberts, 5 Serg. & Rawle, 138.

[2] Such a contract "is to tempt a man to transgress the law and to do that which is injurious to the community." Collins v. Blantern, 3 Wilson, 350. Of course, such an agreement must be worthless, because the prosecution of criminals is the work of the state. Nevertheless, a corporation or other defrauded party may, by withholding evidence of the criminal's guilt, prevent, in fact, the state from obtaining a conviction.

[3] In Pennsylvania.

makers for forgery is illegal, and cannot be enforced. As forgery is condemned by statute, and as the crime cannot be compromised, a note founded on a compromise of the unlawful act is invalid.

10. Any work or service rendered to, or for, a person on his request is a good consideration for a promise to pay for it. If no promise is made the law will imply one. In other words, it presumes that he has made such a promise, and will not permit him to enter a denial. The same rule applies to the payment for goods or property of any kind delivered to anyone by his request.

11. Again, should A agree with B to work for him for a specified period, and, after working awhile, leave without good cause, can A recover anything for the service rendered? In some states A can recover what his service is worth, B having a right to set off or deduct the amount of any loss or damage he may have sustained; in other states A can recover nothing. Wherever A can recover anything this is not by virtue of his contract, for the reason that, having broken it, he cannot ask the court to enforce it. He recovers, if at all, on the ground of an implied contract; in other words, the law enables him to recover, after due consideration of all the facts, the worth of his service, whatever it may be, for the reason that it is just for him to receive so much.

12. No person can make another his debtor against his will by a voluntary offer of work, or money, or goods; but when such an offer is accepted, and the work, merchandise, or other thing is retained, the law generally will imply or presume that it was offered by the other party's request, and will imply his promise to pay there-

for. Consequently, the law will require the promisor to fulfil his promise, unless it can be shown that the thing was a mere gift.

13. A promise is a good cause or consideration for a promise, and this frequently occurs. For example, a promise to accept goods and pay for them is a good consideration for a promise to deliver them. An illustration of this principle is an agreement by creditors with their debtors, whereby they are to receive a sum or dividend, or other thing, in discharge of their indebtedness. Such agreements are often called compositions. Usually, a fixed payment, or several payments, are to be secured to each creditor in proportion to the debtor's assets. In such a case each creditor signs the agreement, and the promise of the one is valid or binding on each and all of the others.

This principle, that a promise is a good consideration for a promise, has sometimes been applied to subscription papers, the promise of each subscriber forming a good consideration for the promises of the rest. As the doubt concerning the liability of the subscribers is the want of a consideration, it may be remedied by affixing a seal to each name, or by affixing a seal which is declared in the instrument to be the seal of each one.

In the way of more specific principles (1) the act of one who subscribes to the shares of a contemplated corporation is a mere proposition or offer which may be withdrawn any time before the organisation. (2) After the organisation is completed he is bound by virtue of the charter or statute authorising the corporation. Says Morawetz: "The validity of a subscription for

shares depends upon the charter or statute under which it is made; and, if the terms of the statute have been complied with, the subscription will be binding, although it will not be binding considered as a common law contract by reason of the absence of a legal consideration." (3) One who subscribes to raise a fund for charity, education, an improvement, and the like, may withdraw unless some act has been done in reliance thereon, like the purchase of land. (4) If such an act has not been done a subscriber is not bound, even though the terms of the subscription be complete, as the raising of a specified sum for a college. (5) Death before such an act is done operates as a revocation, and the subscriber's estate is not bound.

14. No contract or promise can be enforced by a person who knew that its performance was wholly impossible. But he cannot defend himself by showing that the performance of his promise was impossible whenever by his own fault, or by his own personal misfortune, it cannot be executed. There are, however, promises or contracts which, from their very nature, must be construed as if the promisor had said, "I will do so and so if I can." For example, should A promise to work for B for one year at twenty dollars a month, and, at the end of six months, be disabled by sickness, B cannot compel him to fulfil the contract, and A can recover his reward for the time spent in B's service. A mere want of money is not regarded by the law as a legal impossibility.

15. Lastly may be considered contracts in which there is a failure of consideration. If a consideration is given, apparently valuable and sufficient, but proven to

be worthless before the contract is properly performed on the other side, the law does not require anything more to be done. Money paid on such a contract can be recovered (though without any increase or addition) as a compensation for the other's loss and disappointment. A consideration that has partly failed, but leaves a substantial, though much less valuable, consideration remaining, is a sufficient foundation for requiring the other party to fulfil his promise. He may then be sued on his promise, but is entitled by deduction, set-off, or in some other way, to an allowance or indemnity for whatever loss he may have suffered in consequence of the partial failure of the consideration. Thus, should B promise to pay money for work that is to be done in a specified way, or as the price of a thing that is to be made for him, and no work is done, or the thing is not made, A cannot enforce the promise for the payment of the money because the consideration has failed. But if the work was done, though not in the specified manner, and accepted by B, he may show that the consideration for his promise has partly failed, and may have a proportionate reduction in the amount that must be paid.

16. Another illustration of the failure of consideration may be given. A agreed to deliver to B some machinery, and took notes in payment. At the same time it was agreed that the ownership of the machinery should remain with the seller until the notes were paid. Before the time for paying them arrived the machinery was destroyed by fire. As the consideration for the notes had failed before their payment, the maker was no longer liable.

17. Another application of this principle may be men-

tioned. A difference sometimes arises when A undertakes to do something for B, for which A is to be paid a specified price. In executing the undertaking A departs materially from B's direction. What are the rights of the parties? This question arises most frequently in building contracts, in which there is often some departure from the original undertaking. If B assents to the alteration he is bound as strongly as he would have been by the original contract. He may assent openly, by word or in writing, or by seeing the work done and approving it, or by silence, for silence in such circumstances would generally be equivalent to an approval. But, if the change were one that B had a right, either from the nature of the change, or from A's language concerning it, to suppose would add nothing to the cost, then no promise to pay an increased price would be inferred from either an express or open approval. Generally, if A does or makes what B did not order or request, he can refuse to accept it, but when B does accept he must pay therefor. For example, should A choose to add something to B's house without his request, or make some alteration therein, B may retain the thing and yet not be liable to pay therefor, and A has no right to take it away unless he can do so without injury to the house. This rule would apply whether the addition or alteration was large or small. Building contracts sometimes provide that B shall not pay for any alteration or addition unless it has been previously ordered in writing. Without such a provision B would be liable for any alteration he ordered, or voluntarily accepted after its completion. It is also sometimes agreed that, for any additions or alterations,

the same rate shall be paid as for other work. The remark may be made that the law would imply an agreement of this character if it were not made by the parties themselves.

18. Though a consideration is always required, in some cases the proof that one was given may be omitted on trial. The most common case is a promise in writing wherein a seal is added to the promisor's name. No consideration need be proved, because the law presumes there was one. Suppose that two writings are similar in form; one is sealed, the other is not. The law supposes or assumes that a sealed instrument is drawn with care, is of more solemn character than an unsealed one. The law, therefore, assumes or implies that there was a consideration in the one case, while in the other it must be proved.

There are many principles of the law founded on reasons that grew out of conditions or circumstances that no longer exist. In the olden time, when people could not write their names perhaps, much less deeds and other papers, they used seals as proofs of their signatures. Every person had a seal of his own, and, whenever he used it, the writing was regarded as important; and in its preparation all the formalities were remembered, and especially the cause or consideration. Consequently, the law did not require any proof of a consideration in such cases. In modern times, while many an unsealed instrument is drawn with just as much care, and a seal conveys no special or distinctive mark or characteristic, as almost all seals are alike, nevertheless a different rule of proof ap-

plies to sealed, from that applied to unsealed, instruments.

19. A moral obligation to pay money is a good consideration for a promise to do so, whenever there was, in the beginning, an obligation to pay. Thus, the subsequent promise of one who has borrowed money of another and given his note therefor, which by lapse of time has ceased to be binding, can be enforced because there was a good consideration for the first or original promise; namely, the money received from the lender.[1]

20. A contract may be modified by mutual agreement without a new consideration. Says the court in a case calling for the application of this principle: "The consideration for the original agreement is imported into the new agreement, which is substituted for it. No good reason is perceived why the same principle does not apply to the rescission of a contract."

SUBDIVISION 4—ASSENT

1. Parties to a contract must agree to the same thing in the same sense.
2. When the assent must be given.
3. Effect of accepting an offer on a condition.
4. Assent may be inferred from circumstances.
5. Assent is a question of fact.

[1] "Thus, a promise to pay a debt contracted during infancy, or barred by the statute of limitations or bankruptcy, is good, without other consideration than the previous legal obligation. It must, however, be distinct and specific; and it has been held that the payment of interest, or even payment of part of the principal and its indorsement on the note by the debtor himself, is not sufficient to warrant a jury in finding a new promise to pay the whole debt." 1 Parsons on Contracts, p. 471.

6. An accepted proposition that is to be put into writing is usually not binding.
7. When assent has been given the contract cannot be altered without another assent.
8. Offers on time.
9. How long may an offer continue?
10. A consideration is not required to sustain an offer.
11. An offer for a fixed time may be recalled.
12. Illustrations of this principle.
13. If no time is fixed the law presumes a reasonable time.
14. Offers and replies by correspondence.
15. An illustration of a bargain by correspondence.
16. An offer cannot be turned into an acceptance.
17. Rewards.
18. A contract is binding from date of accepting offer.

1. To make a contract the parties thereto must agree to the same thing in the same sense. If this be not done the contract is not complete. Thus, on one occasion, a person offered to sell to another by letter a quantity of "good barley" at a specified price. The other replied, "We accept your offer, expecting you will give us fine barley and full weight." As the barley was not delivered, the buyer sued for the injury or loss he had suffered. On the trial of the case the evidence showed that the terms "good" and "fine" were well known in the trade, and meant different qualities of barley, and that there was not an acceptance of the offer of good barley. Consequently, nothing could be recovered. Again, a person sent an order to a merchant for a quantity of goods on well-

defined terms of credit, and the merchant sent a smaller quantity on a shorter term of credit. The goods were lost by the way, and the sender having sued to recover for the amount, it was decided that he must bear the loss, as there was no sale or contract between the parties.

2. Usually the assent must be given at the time of making the offer. In many negotiations an agreement is immediately completed; or, if it is not, then both parties understand that the negotiations are at an end.

3. Again, a person who receives the proposition or offer, and accepts it on any condition or with any change of terms, does not complete the contract unless the party who made the offer assents to the modification. For example, in the case of a party who offers to buy goods at a named price, and specifies the mode of sending them, which is accepted, and where the goods are sent as directed, and lost on the way, the buyer is the loser, because the goods were his by the sale, which was completed by the acceptance of the offer. But a seller who should accept the offer, and in his acceptance make some modification of the terms, and then send the goods should they be lost, would be the loser, because the contract of sale was not completed.

4. Sometimes assent may be inferred from circumstances. Thus, a contract in writing may be good though signed by one only, for the assent of the other may be inferred from his possession of the paper and other circumstances. Another illustration—the placard of rules posted in factories for operatives. These are regarded as agreements or contracts with them, and may be enforced. Of course, an operative in a mill is not bound

unless he knew of them; but, when knowledge is proved, he is as clearly bound as he would have been by putting them into his hand at the time of employing him. Another example may be given. A son was taken sick, and his father declared that whoever would take care of him should be well paid. This offer was made known to a person who was then attending him, and who continued his service, and after awhile demanded payment from the father. By thus caring for him the nurse was regarded as accepting the offer. Compliance with the proposition, especially when no notice of acceptance is required, is the most significant evidence of acceptance.

A voluntary compliance with the terms of an offer by one who had previously declined them would render the acceptor liable.

5. These illustrations are sufficient to show the nature of the principle to assent of a contract. They also clearly show that this is a question of fact that must be determined in each case. Have the parties assented or come together? In other words, have their minds met and thus completed their negotiation? If they have, then the law regards the assent as complete; otherwise, no contract has been made.

6. Another important principle is that a proposition immediately accepted, but which is to be put into writing, is usually not binding. Thus, on one occasion A met B accidentally, and said to him that he could sell coal as cheaply in Cincinnati as at Pittsburgh. B replied, saying that he would take a quantity at Cincinnati at a specified price, which was also the Pittsburgh price. A also said he must be paid in cash, and have security for the return

of the barges that were to convey the coal. B replied, "Certainly," and prepared a memorandum of the agreement and drew his check to A for the price of the coal. A said, "I will have the papers drawn to-morrow." B called on A the next day, a dispute arose, the agreement was not put in writing, and nothing further was done. The contract was regarded as not completed.

7. For the same reason, that when assent has been given to the terms proposed the contract is completed, they cannot be altered without another assent. In other words, a contract cannot be altered by the simple act of one party. There must be a second meeting of minds to change its terms. Thus, A agreed by written contract to carry coal for B from one place to another. B afterward wrote to A, proposing alterations in the quantities that were to be carried, to which A did not reply. The contract remained unaltered.

8. We shall next describe offers made on time. Strictly speaking, every offer is of this character, but, in the large number of transactions, the offer and the assent or dissent are nearly at the same time. If one says, "I will send you this thing for a specified price," and the other answers, "I will take it," the assent is complete, and the contract is fully formed. But the answer follows the offer, and it cannot be actually at the same time. The offer, however, is regarded as continuing until the acceptance, if this is done at once. Though the party addressed pauses a moment or two to think about the offer, still his assent makes a contract, for the offer continues until it is withdrawn. How long does the offer continue? The answer is, a reasonable time; and what this is must depend on

the facts in each case. If the party addressed goes away and does not return for several days, and then says he will accept the offer, he is too late, unless the proposer, in his turn, assents. So he would be, probably, if he came the next day, or even the next hour.

"An offer without more," says Justice Mitchell, "is an offer in the present to be accepted or refused when made. There is no time which a jury may consider reasonable or otherwise for the other party to consider it, except by the agreement or concession of the party making it. Until it is accepted it may be withdrawn, though that be at the next instant after it is made, and a subsequent acceptance will be of no avail."

9. What is a reasonable time depends on the nature of the proposal and the situation of the parties. Oral evidence of known facts may be admitted to assist in determining what would be a reasonable time; but when a written proposition is to be accepted within a reasonable time oral evidence is not admissible to show that the parties agreed that the proposal should remain open for any specified time.

An acceptance of an offer to sell real estate five days afterward was held to be within a reasonable time.

The person making the offer may say how long the offer shall continue. He may say to the other, "I will give you an hour, or a day, or a week to make up your mind." Then the person to whom the offer is made knows the duration of the offer. He may avail himself of the specified period for making inquiry, and if, within the time fixed, he expresses his assent, the contract is com-

pleted as effectually as if he had answered as soon as the offer was made.

10. It has sometimes been said that the person making the offer cannot be bound whenever the assent has been delayed, even though a fixed time was given to the other, because there is no cause or consideration for continuing the offer. But, as an eminent law-writer has remarked, if one who makes an offer that is instantly accepted is not bound because there is no consideration, then it might be said that he would not be bound by an answer made within a specified time. No one doubts that an offerer is bound by an immediate acceptance, though he receives no consideration therefor. If this be true why does not the same principle apply to an acceptance that follows an offer in a second, or a minute or two, or even a longer period, not passing beyond a reasonable time or a time mentioned by the proposer himself?

11. However, an offerer who states a specified time for acceptance without a cause or consideration may, at any time before his offer has been accepted, recall it, and he may do this even if he gives no time. And, if he makes an offer that is instantly recalled, it cannot be accepted by the other party whatever may have been his intentions.

12. Two or three illustrations may be given. In one of them a person was appointed an agent of a fire insurance company, with authority to take applications for insurance. An offer for insurance was made to a person, but was not accepted for nearly six months. This was deemed too late. Undue delay in accepting an offer may be, and should be, treated as a refusal, and the proposer is not bound by a tardy acceptance. A proposal

by letter remains a proposal for a reasonable time, and is then regarded as withdrawn. Both parties are interested in its acceptance, and both are expected to attend to the matter with reasonable diligence. In another case, B having agreed to build a house for A, made a contract with C for the materials. As A owed money to B on account of the contract, he wrote a letter to C, saying, "If B gives you an order on me for the bill of materials I will accept it and pay it." C took no action concerning the letter for more than two weeks and then he wrote a reply to A, reminding him of the fact that he had sent a letter indicating his willingness to accept an order for the materials he had furnished. At that time A had paid to B the full amount of his indebtedness to him. Two months afterward B gave C an order on A for the price of the materials. The delay was too great in acting on this order to make A liable for the amount. Surely C had no reason to suppose after such a long delay that A's offer was still open for acceptance. Most offers, as we shall shortly see, are for very brief periods of time, or for an immediate acceptance or refusal, and A doubtless supposed that, if C did not choose at once to accept his offer to pay the bill for the materials, or to become responsible for them, he expected to look to the buyer for his purchase money. Great confusion would indeed be wrought if, after making an offer of this kind, and delaying two or three weeks, or perhaps longer, an acceptance could be sent binding the person who made the offer.

One other illustration may be given. A railroad company desired to buy some land, and the owner stated in a letter that he would sell if his offer were accepted

within thirty days. After twenty-five days the railroad company accepted the terms. The owner then declined to let the company have the land, having made up his mind that it was worth more. He maintained that he had a right to withdraw the offer because nothing had been paid to him for the delay, but the court decided that his offer continued through the specified period unless it was withdrawn. Had the owner done this the railroad company could not afterward have accepted his offer. But, after the offer had been accepted, the minds of the two parties had met, the contract was complete, and no withdrawal could be made.

13. If the proposer fixes a time, or expresses his intention, then the other party knows exactly what it is. If no definite time is stated then the inquiry concerning a reasonable time is one of fact that ordinarily must be decided by a jury.

In applying this principle to subscriptions, how long is a person bound by a promise contained in a subscription? If no time is fixed and there is no express withdrawal, the court will look into all the circumstances, and inquire what the parties actually understood or intended, and endeavour to carry this intention into effect.

14. Lastly, may be considered offers and replies by correspondence. Many contracts are made in this manner, either by letter or by telegram. At what time, or by what act, is such a contract completed? If A writes to B making an offer, this is regarded as continuing until it reaches B and during a reasonable time thereafter for accepting it. It may, however, be withdrawn by A at any time before acceptance, but is not withdrawn in law

until a notice of withdrawal reaches B. Thus, should A in Philadelphia write to B in New Orleans, offering him a certain price for one hundred bales of cotton, and the next day alter his mind, and write to B withdrawing his offer, and the first letter should be received before the second, B has the right to accept the offer and by his acceptance bind A. Should B delay to accept until the receipt of the second letter, A's offer would then be effectually withdrawn. It is a sufficient acceptance if B writes to A to this effect, and puts his letter into the post-office. The minds of the two parties have met as perfectly as if the acceptor had put his answer into the hand of a messenger sent by the offerer himself. The contract is properly held to be complete when the acceptor has mailed his letter of acceptance, for another reason, namely, the offerer contemplated and implied that the acceptor would manifest his intention in this manner. Offers by letter can be withdrawn or set aside by the quicker action of the telegraph. Thus, in the case just mentioned, should A, after sending his first letter, telegraph a withdrawal of his offer to B, which reaches him before his written offer, his withdrawal would be effectual. But, if an offeree should accept and mail his offer, he could not revoke it by a subsequent telegram saying that he declines the offer, even though this should reach the other party before the letter of acceptance. Sometimes the case has been put of an offer sent by letter in a sailing ship, and a withdrawal sent later in a steamer that has arrived first. In such a case the withdrawal would be effectual. One can readily imagine cases in which, perhaps, parties who were dishonest

would deny receiving first the information sent last, but probably in most of them it would not be difficult to trace the sending of a telegram, the time it was received at the other place, its delivery, etc., to the party for whom it was intended.

Though the post-office is usually the agent of the sender of a letter, in the case of an offerer the post-office is his agent or servant both in sending his offer and receiving his reply.[1] Consequently, an acceptance is binding as soon as the letter is delivered to the post-office.

15. An illustration of a bargain by correspondence may be added. It related to the purchase of iron. A wrote to B, "We will take one hundred tons, delivered [at a place mentioned] as early in the spring as the navigation will admit," and a further quantity at any time between two dates that were mentioned. To this B replied in a few days: "We will have no metal to deliver after the spring freshet, or, in case of no freshet in the river, in the canal immediately after. Therefore, it will be necessary for you to say what quantity you will take on spring delivery." An immediate answer was requested. In answer to this, A wrote that he would take a specified quantity if delivered in a way described, or one hundred and fifty tons if delivered in another way. To this letter no answer was given, and A tried to recover damages for the non-delivery of the one hundred and fifty tons. This was a request for a definite order, but the court

[1] The rule is otherwise in Massachusetts. In Massachusetts an acceptance by letter or telegram is not complete until it reaches the offerer. This rule prevails only in that state.

decided that the contract was not complete without a further reply from B. The court declared that the last letter did not complete the transaction. It suggested a new proposal, and required another communication to complete it. It might not have suited B to furnish one hundred and fifty tons in the spring, and no one but himself could say that it would. He had not said so; he had left A's letter unanswered, and the transaction therefore was unfinished.[1]

16. A person who makes an offer cannot turn it into an acceptance. Thus, a sly old uncle offered by letter to buy his nephew's horse for thirty dollars, and added, "If I hear no more about the matter, I consider the horse is mine." No answer was received; nevertheless there was no meeting of minds and no contract, for only one mind had been active.

17. Offers or rewards are often made by advertisement and, when accepted, are usually binding. Thus, the owners of a cure-all medicine—a carbolic smoke-ball—offered to pay £20 to any person who contracted influenza after having used one of their smoke-balls in a specified manner. A person followed the directions, and, failing to receive the benefit expected, sued for the offer and recovered. A case worth noting has been decided in Illinois. A person offered the following reward: "Harness stolen! Owner offers $100 to anyone who will find the thief, and another $100 to prosecute him." Stimulated by the reward, the thief was caught and prosecuted, and the reward was claimed. This demand for the

[1] "By return mail" does not mean the next mail. A delay, however, of three or four days is too long.

money cooled down the offerer immediately, and he resisted payment, and, forsooth! escaped, the court declaring that his advertisement was not an offer to pay a reward, but an explosion of wrath.[1]

18. A contract dates from the acceptance, and not from the time of the offer, and is regarded as made at the place of acceptance, and, therefore, construed or interpreted by the law of that place. But if it is to be performed at another place, usually it is interpreted by the law of the place of performance.

SUBDIVISION 5. WRITTEN CONTRACTS AND THE STATUTE OF FRAUDS

1. Some contracts must be in writing to comply with the statute of frauds.
2. The more important sections of the statute.
3. A promise by an executor or administrator.
4. A promise to pay the debt of another.
5. Agreement in consideration of marriage.
6. Agreement not to be performed within a year.
7. Agreement concerning the sale of land.
8. Nature of the writing required to satisfy the statute.
9. The sale of goods.
10. Application of the statute to a contract for the manufacture of an article.
11. The statute does not apply to executed contracts.

[1] A man's house was burning, and he offered to give $5,000 to anyone who would bring the body of his wife out of the building, "dead or alive." She was rescued, and the reward was demanded. He was obliged to pay. He was not permitted to defend on the ground that his words were merely an explosion of affection. It is difficult to distinguish between the two cases.

1. The law requires some contracts to be in writing. A statute relating to the subject was passed during the reign of Charles II. (1677), requiring this to be done for the purpose of preventing frauds and perjuries. It was supposed that a law requiring contracts to be put in writing and signed by the person who was to pay for the thing purchased, or to do the thing promised, would lessen fraudulent practices. Yet it has been remarked by those who understand the history of this statute that, whatever may have been the intention of its authors, it has been the means of enabling persons to injure others in the way of opening a most convenient door for not fulfiling contracts which were honestly made, but which they did not wish to execute. Many a contract made in good faith has not been enforced, because the breaker did not comply with the law, by putting it in writing and signing his name thereto. This statute shows how very slowly the people learn of the laws; for, though it was re-enacted in this country in the early times, yet there are many to-day who are not familiar with it, and consequently do not observe it.

2. This statute has been enacted in nearly every state in the Union, with some changes. The principal provisions of the English statute re-enacted in this country, and to be considered here, are the fourth and seventeenth sections. The former provides that no executor or administrator shall be personally liable on any promise that he may have made; nor any person on a promise for the debt or default or miscarriage of another; nor shall any person be liable on an agreement made in consideration of marriage; nor shall any contract or agree-

ment for the sale of lands or leasing of them, that is not to be performed within one year from the time of making it, be valid, unless the agreement, or some memorandum or note of it, is in writing and signed by the party who is charged as having made it, or some other person lawfully authorised by him to sign the same.

The seventeenth section provides that no contract for the sale of any goods, wares or merchandise for the sum of fifty dollars, or more, shall be good, unless the buyer has accepted part of the goods thus sold and actually received them, or given something in the shape of earnest to bind the bargain, or in part payment or unless there shall be some note or memorandum in writing of the bargain made and signed by the parties to the contract or their agents.

3. The first clause relates to the promise of an executor or administrator. The duty of these persons, as is well known, is to settle estates. The law does not make them personally liable for any contracts made by them. They can, indeed, make contracts for which the estates they represent may be liable, but personally they are free.

4. The next provision relates to promises to pay the debt of another. This provision has often been difficult to enforce. A person, of course, is liable on his own promise to pay for whatever he may purchase, but is he liable to pay for the debt, or default of another, unless there be an agreement in writing, as the statute requires? In such a case is the promise to pay one's own debt, or to pay the debt of another? One may think that this question can be easily answered, but, in

truth, it is often very difficult to answer. For example, if two persons go to a shop and one buys and the other, in order to give him credit, promises the seller, "If he does not pay you, I will," this is a promise to pay the debt of another, and is void unless it is in writing and signed by the promisor. But if he says, "Let him have the goods, I will be your paymaster," this is an undertaking for himself, and the law regards him as the actual buyer and the other only as his servant. Again, if B furnishes goods to C on A's express promise to pay for them, saying to B, "Let C have goods to such an amount, and I will pay you," the credit is given to A, and in that case C is not liable for them and A is the immediate debtor. The undertaking is said to be original with him and not a collateral one; therefore, it need not be put in writing. Whether a promise is an original one to pay one's own debt, or a collateral promise to pay the debt of another, is a question of fact to be determined in each case. The cases calling for this application of the statute are numerous.

Whenever the main purpose and object of the promisor is not to be responsible for the debt of another, but to serve some purpose of his own, his promise is not within the intent of the statute, although in form it may be a promise to pay the debt of another. If there be coupled an oral promise to pay the debt of another and also to do some other thing, the latter thing can be enforced at law, but not the promise to pay the debt.

5. The clause relative to agreements made in consideration of marriage requires brief explanation. The promise to marry is not within the statute, but all promises

in the nature of a settlement or advancement in expectation of marriage must be in writing.[1]

6. Another clause of the fourth section of the statute relates to agreements that may not be performed within a year. This does not apply to agreements which, at the time of making them, are understood by the parties to be fairly capable of completion within a year regardless of any circumstances, although in fact their execution may extend far beyond that period. It, therefore, does not apply to a contract for personal service for an indefinite period, or for a term of years, which will end with the death of the servant, for the reason that the contract may be fully performed within a year. Nor does it apply to any kind of contingent contract that may be performed within that period; for example, the payment of money on the return of a ship.

7. Another clause relates to the sale of land, or an interest therein. The language here used is very broad, and includes within its scope all leases of real estate for any period no matter how short; but, in some states, leases having a period not exceeding one year are by statute declared valid, even though they are not in writing. It may also be remarked that it is not always easy to distinguish between an interest in land and a mere lease to use it for some special and temporary purpose; for example, to put hay or grain there, or to keep a wagon or implements, for a license need not be in writing, while an interest in land must be, to comply with the statute. With respect to fruits and nursery trees, the courts generally hold that such contracts are not an interest in

[1] See Book IV., Chap. I., Sec. 3, § 26.

land, whenever the intention of the parties is to remove them at once, or within a short period.

8. Next may be considered the nature of the writing required to satisfy the statute. It need not be on a single piece of paper. If there are several letters from which a contract can be formed these are clearly sufficient for the purpose. Not infrequently a letter, or a series of letters, exists from which a contract can be made out. Whether there must be a consideration in writing or not is a disputed question, some of the courts holding that this must thus appear; others, that it may be proved by other evidence. With respect to the signing this need not be technical or formal. [illegible] party, [illegible] writes his name in the beginning, or in any [illegible]sation; a[illegible] agreement with that intention, this will be r[illegible]te."[illegible] sufficient signing to satisfy the statute. Mo[illegible] not apply to [illegible]ning is sufficient if printed or written wit[illegible]ithin the statut[illegible] other material with which writing or [illegible] of the parties to [illegible]ibly done, as the statute does not sp[illegible]y particular material. An agent, of [illegible]VISION 6. PAYMENT [illegible]s principal. A signature by an agen[illegible]

The memorandum [illegible] made only in cash. [illegible]es of the parties and all the oth[illegible]y a tender. [illegible]. Again, the records of a corp[illegible] money may be tendered. [illegible]ms of the contract and duly [illegible] kinds. [illegible]r, are a sufficient memoran[illegible]dering payment.

9. The seventeen[illegible]nnot afterward take advanta[illegible] goods, wares, or other m[illegible]ty. [illegible] from thirty to fifty doll[illegible]nder and payment into court [illegible]states. To comply with [illegible]e. [illegible]cept-ance. For exar[illegible] 60. [illegible]n to

purchase one hundred cords of wood for five hundred dollars. B sends the wood immediately to A, but, as the statute requires an acceptance or actual receipt of a portion, A may return the wood if he desires without any reason; and, if there has been no signed written memorandum or actual receipt of a portion, B cannot recover his money. A delivery is sometimes said to be constructive. For example, the delivery of the key of a building in which property is contained; or, if the goods are in storage, the making of an entry by the direction or assent of the vendor on the books of the warehouseman; or the delivery and receipt of a bill of lading properly endorsed; or the ... within ... it of the thing if it is difficult of removal. It ... gent contr'elivery and acceptance are sufficient if thered; for examp y transfer of possession or control of the ... a ship. seller to which the purchaser has ass... lause relates to ... is intended that it shall pass from th... n. The language ... nto that of the buyer's. With respe... within its scope all ... be remarked that part payment n... no matter how short ... which the one party may choos... ng a period not excee... accept.

10. A c...lared valid, even though ... liver an article is not within th... so be remarked that it ... t a contract to deliver a thing ... h between an interest in ... manufacture at a future t... use it for some special and ... ays Parsons, after showing ... nple, to put hay or grain there, ... om the numerous and co... ements, for a license need not b... A pure executory contr... erest in land must be, to comply ... merchandises, is as mu... respect to fruits and nursery ... of present sale. A co... rally hold that such contracts are n... er's, or not existing ... See Book IV., Chap. I., Sec. 3, § 26. ...ght or manu-

factured before it can be delivered, will also be within the statute if it may be procured by the seller by purchase from anyone, or manufactured by himself, at his choice, the bargain being in substance as well as form, only that the seller shall, on a certain day, deliver certain articles to the buyer for a certain price. But, if the contract states or implies that the thing is to be made by the seller, and also blends together the price of the thing and compensation for work, labour, skill, and material, so that they cannot be discriminated, it is not a contract of purchase and sale, but a contract of hiring and service, or a bargain by which one party undertakes to labour in a certain way for the other party, who is thereupon to pay him a certain compensation; and this rule is, therefore, not within the statute."[1]

11. The statute does not apply to executed contracts. But an oral contract within the statute, partly executed, will control the rights of the parties to that extent.

SUBDIVISION 6. PAYMENT

1. Payment can be made only in cash.
2. What is meant by a tender.
3. What kinds of money may be tendered.
4. Why not all kinds.
5. Effect of tendering payment.
6. A creditor cannot afterward take advantage of an ir
   formality.
7. A lawful tender and payment into court is a
   defense.

[1] Vol. III., p. 60.

8. A note or check is not absolute payment.
9. Whether it is payment is a question of intention.
10. Is the note of a third person payment?
11. A creditor should be diligent in collecting a check.
12. When a check is not paid, a creditor can collect original debt.
13. Application of money when the debtor owes several debts.
14. Application by bank of a customer's deposit in payment of his note made payable there.
15. Application of customer's deposit to note not made payable there.
16. Bank cannot pay unmatured note.
17. Nor apply trust money in payment of his note.
18. If note is endorsed bank must apply customer's deposit in payment.
19. Unless the depositor has appropriated it.
20. What can be done when the deposit is insufficient.
21. Where shall payment be made.
22. To whom shall payment be made.
23. Effect of part payment.
24. Effect of a discharge under seal of a debt partly paid.

1. Many questions have arisen concerning the mode of making payments. Parties may agree to any mode of payment they please. The amount may be paid in money, or by a bill or note. Unless an agreement is made, the only payment known to the law is cash. This debtor must pay when his debt is due, or at least he must as der the amount due to his creditor.
A What is meant by tendering payment? It means istin is

the offering to one's creditor in legal money the amount due him. Not every kind of money can be used in making a tender. First of all, cash can be used for this purpose, by which is meant gold or silver.

3. Silver coins, except the dollar, are a legal tender only to the amount of ten dollars, and the minor coins, the five and one-cent pieces, to the amount of twenty-five cents. There are many kinds of paper money and gold certificates. Only one kind can be used in making a tender in all payments—the notes issued by the United States Government, and commonly called legal-tender notes. National bank notes are a legal tender to the Government, and by one national bank to another, but cannot be legally tendered in payment of a debt by one individual to another.

4. Why has not a national bank note the same legal-tender power as a United States note? Because Congress has declared what notes shall be a legal tender and what not. One may ask, is not a five-dollar bank note worth as much as a United States note of a similar denomination? Unquestionably, yet this does not endow it with legal-tender power, except to a limited degree, as already explained.

5. If the proper kind of money is not selected and used by the debtor in making a legal tender, the law regards him as not having offered to pay his debt; and, if his creditor should sue him for the amount, he could not claim or defend that he had paid it, or made a legal effort to pay it. On the other hand, when a debtor has offered to pay his debt in legal money, then his creditor, should he sue for the amount, could not recover the

costs of his suit, but simply the money that was offered or tendered to him.[1]

6. Generally, if a tender be refused for any specific reason, the creditor cannot afterward take advantage of any informality to which he did not object at the time the tender was made. A tender of a larger sum than is due may be made, but, should the debtor require a repayment of the balance, the tender would not be good. Furthermore, there must be no condition at the time of making a tender, not even that it shall be received as the full amount due; nor can a receipt in full be demanded, but a receipt for the amount tendered or paid may be.

7. If a creditor declined to receive the amount tendered by his debtor and was sued, he might tender the amount he thought due to a proper officer of the court; and if the judgment against him were not for a larger amount the costs of the action would be thrown on the plaintiff.

8. A note or check given for a bill or other obligation is not an absolute payment. It is of no higher character than the note itself, which is not money. Again, a note given after the accounts between two parties have been settled is evidence of the settlement, but not payment of them. But, in every case, it is payment provided the parties agree that it shall be. Unless such an agreement is made the note or check is conditional payment only, and remains so until the note or check is paid. When this happens then the bill for which the note or check was given is paid, but not before.

[1] "A plea of tender," says Parsons, "does not bar the debt, but it puts a stop to accruing damages or interest for delay in payment." 2 Parsons, p. 791.

9. Whether the note, check, or other instrument is to be considered as payment or not is a question of intention. Unless this is clearly proved the instrument does not operate as payment.

10. Is the note of a third person, transferred to a creditor, payment of the debtor's debt? It is presumed to be payment when this is understood by the parties as shown by the creditor's giving the debtor credit for the amount. A debtor who endorses such a note is liable simply as an endorser, and he can be held only in that capacity.

11. A check is often given in settlement of an obligation. On such an occasion the receiver has a distinct duty to perform. He should present it within a reasonable time to the bank on which it is drawn for payment. If this is not done, and the bank should fail, the holder of check would be the loser. The debtor has given him an order on a bank in which he has money, which it is the creditor's duty to collect within a reasonable time. It is not reasonable to hold the debtor always liable for the money.[1]

12. When the check or note thus given is not paid on due presentation, the creditor can collect the original debt if he desires, as this remains against the debtor as if no note or check had been received.

13. If one owes several debts to his creditor and makes a general payment, the question sometimes arises how shall the money be applied? First, the debtor can designate how it shall be, and if he does not, then the creditor can apply it to whatever debt he pleases; if he makes no

[1] See Section 3, Subdivision 6 of this chapter for the rules relating to the time when checks must be presented for payment.

application then the law has established some rules. These are, first, if the debts bear interest and none has been paid, the money must be applied first to that and then, if a balance remains, to the principal. If there are several items the money must be applied to the oldest. Again, if there are several claims secured in different ways, the law applies the money to the oldest secured claim; and if a surety is holden on this he also may insist on this application of the money, and should the amount be sufficient he would be discharged. The money will not be appropriated in the way most advantageous to the creditor to the loss or injury of a surety; on the other hand, he cannot require a general payment applied to the last debt on which he may be the holder, regardless of the interests of the creditor.

14. The application by a bank of funds in its possession belonging to the maker of a note *payable there* may next be considered. In most states such a direction in a note is regarded very much like a check. It is an imperative order to pay the note. By the Negotiable Instrument Law, "where the instrument is made payable at a bank, it is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon."

15. In other states to such a note a different rule applies. The bank may exercise its discretion in paying it. The bank may take the risk of collecting the note, and permit the depositor to withdraw his deposit. In most states banks pay, when depositors have sufficient funds, and are protected by the law in so doing. In the smaller number this right or duty is withheld from them.

16. In no case, except that of insolvency, can a bank pay an unmatured note of a depositor.

17. Nor can a depositor of trust money, which is known by the bank to possess this character, though deposited in an individual name, be applied to the payment of the depositor's obligation.

18. In some of the states, if the note has been endorsed or guaranteed, the bank has no discretion, and must apply the maker's deposit on his obligation, though a neglect or mistake to do so does not relieve the maker from payment. This is quite similar to the rule that requires a creditor who has the means for paying his debt to apply it in this manner. The note is in effect a draft or order on the bank in favour of the holder and discharging the endorser. This rule, however, does not apply to a note payable at a bank and presented there after its maturity. Its payment is not required for the protection of the endorser. If, therefore, no application of the depositor's money is made, the endorser is not discharged. Generally, a bank declines to pay a note that is presented overdue, but no prohibitory rule against doing so has been established except in those states, a few in number, in which a bank is forbidden from paying the notes of its depositors without specific direction.[1]

19. When a depositor has made a special application or appropriation of his deposit, and has notified the bank of his action, it cannot charge off a note against his deposit, for a man may do what he will with his own so long as he retains control over it.

[1] See 1 Daniel, on Neg. Inst., Sec. 326b for authorities.

20. Again, if the maker's deposit is insufficient for this purpose, must the bank apply it in part payment of his obligation? Perhaps the same rule should be applied to a note that is applied to a check—the deposit can be paid whenever the holder is willing to receive the same.

21. Next may be considered the question, where shall payment be made? In promissory notes the place of payment is often mentioned. If the maker of a note is at the place mentioned during business hours of the day of payment, and the creditor is not present, all persons who have endorsed it are discharged, but the maker will remain liable. Thereafter the debt will be regarded as payable at the payee's residence, or wherever he may be found by the maker. The maker's liability is the same as it would be on a note payable on demand, having no place of payment specified. If no place of payment is mentioned payment must be made at the residence or place of business of the creditor. It is not the creditor's duty to find his debtor and demand payment; on the other hand, the debtor must find the creditor and pay him.

22. Next we may inquire to whom, besides the principal creditor, may payment be made. First, we remark, to an attorney who is employed to collect the debt. This, however, does not necessarily justify payment to the attorney's agent. Second, payment may be made to any agent of the creditor who is authorised to receive payments in the ordinary course of business, or to a person who appears to be authorised to do the creditor's business, whom the creditor permits to assume such appearance. Third, payment may be made to a trustee, or to one of

several executors. Fourth, to one of several partners. Payment may be safely made to one after the other partners have forbidden the debtor to pay him.

23. What is the effect of part payment? If this is made before a debt is due and received by the creditor by agreement that it shall be in full discharge, it is effective. The receipt also of something beside money in satisfaction of a debt, though apparently inadequate in value, is a good payment. So is the acceptance of a new security, even though for a less amount, taken by agreement in full payment of the debt.

24. Again, when only a part of a debt is paid in money and the creditor gives a discharge, under seal, of the whole debt, he cannot collect the balance. In some states it has been questioned whether, if such a discharge or receipt is given without a seal, the debt is paid. The reason is that a payment of only part of the money cannot properly be deemed a consideration for the discharge of the whole debt. But a release or a receipt therefor under seal by the creditor, even though it be of a part for the whole, will be effective, and, in some states, even though the receipt is not under seal, discharges the debt.

SUBDIVISION 7. INTEREST

1. What is usury.
2. Penalty for taking more than the legal rate.
3. The tendency is to diminish the penalty.
4. Double ground on which interest may be demanded.
5. On what debts interest is allowed.
6. The same subject.

7. When interest begins on a note payable on demand.
8. Modes of escaping usury.
9. Notes purchased.
10. Difference between discount and interest.
11. The legal rate when parties live in different places.
12. What rate can be collected when no place of payment is specified in a note.
13. Interest on notes and other obligations paid in instalments.

1. Interest means the payment of money for the use of it. In most civilised countries this is regulated by law. It declares how much money may be paid and received as a maximum for the use of money. This is called legal interest. If more is paid, or an agreement is made to this effect, it is called usurious interest. By interest, therefore, is commonly meant legal interest, and by usury, usurious interest. Formerly the regulations concerning the rate of interest were more strictly enforced than they are at the present time.

2. When more than the legal rate is taken, as both are parties to the transaction, neither ought to suffer in consequence of the conduct of the other. This feeling has become so general that only now and then does a borrower attempt to enforce the law against the lender, knowing that public sentiment is opposed to his action.

3. The tendency of the law has been to diminish the penalty for taking usury. There was a time when the lender forfeited all the interest as well as the principal whenever he made a loan of a usurious character. Now, the penalty, in most states where a usury law exists,

is only the forfeiture of the interest, or of the excess beyond the legal rate.

The provision of the national banking law is peculiar. A bank may take any rate prescribed by the state where it is located; and where no rate is fixed it is limited to 7 per cent. If it has taken more than the proper rate the borrower may recover "twice the amount thus paid"; if more than the proper rate is to be paid the entire amount of interest is forfeited.

4. Interest may be due and demanded by a creditor, either because the debtor has agreed to pay it, or because the creditor has sustained a loss through the debtor's withholding money that is due. Indeed, it is a well-known rule of law that, whenever money is withheld which is clearly due, the debtor is regarded as having promised legal interest for the delay. The usage of trade and the customary course of dealings between parties have great influence in these matters. Thus, in New York, the courts long ago decided that a buyer who knew that it was the uniform custom of the seller to charge interest after six months on articles sold without payment could be compelled to pay interest after that date.

5. In general, interest is allowed on a debt that is due by a judgment of a court; and on a settled account, from the day of settlement; on goods sold, from the time of the sale, if no credit has been given, and, if there has been, from the day of expiration of the credit; on rent, from the time it is due; also on money paid to another or lent to another, from the time of paying or lending it.

6. Many questions have been raised with respect to the collection of interest on various kinds of debts. Besides

those mentioned a few others may be noticed. For example, a city is not liable for interest on its bonds after they have matured, provided the funds are ready to meet them at maturity. It is not required to seek the holder and tender to him the money. On the other hand, it is his duty to demand payment of the obligation at the time fixed for its payment. If he does not there is no reason why the city should be required to pay continuing interest.

7. It sometimes happens that money is due, but is not payable. Thus, the money on a note payable on demand is always due, but it is not payable until the holder demands it; and does not draw interest until he has demanded payment. But a note payable at a fixed time carries interest from that date whether it is demanded or not.

8. There is no special form or expression necessary to make a bargain usurious. Formerly, when the usury laws were more generally enforced than they are now, there were various methods adopted for evading the law. One of the most frequent ways in borrowing from banks was to agree that a considerable portion should remain on deposit. The effect of this was really to borrow a much smaller sum than that on which interest was paid. It was very difficult to trace usury in this proceeding. Another common way was to solicit a loan through another person to whom a commission was paid, which was divided between the solicitor and the lender. In this way the lender received a larger sum for the use of his money than the rate of interest specified.

9. Often this question had been raised on a note sold

to a third person. Of course, the owner has a good right to sell it for any price he pleases, and when this is done in good faith, in other words, when the sale is real, there is no taint of usury in the transaction. But sometimes a sale is merely for the purpose of obtaining more than the rate of interest, and then the transaction is tainted with usury. Usually, a person who makes his own note and sells it for what he can get is a borrower rather than a vendor, though the transaction has the appearance of a sale.

10. It may be remarked that banks, in discounting notes, do not actually discount them; they simply collect interest in advance on the money loaned. In discounting a note such a sum is given to the borrower as will, at the end of a specified period, at an agreed rate of interest, amount to the sum he is to pay at the end of that period. Suppose one wished to have a note discounted for $100 at a bank, payable in one year from date, what would the bank do? If the legal rate were 6 per cent. the bank would return $94 to the borrower, expecting that at the end of the year he would pay $100. Suppose the bank should agree to discount the borrower's note for that period at 6 per cent. interest, what would the borrower receive? Something more than $94, for the reason that this sum, at 6 per cent., would not amount to $100 at the end of the year. The bank must give him $94.34, for the reason that this sum, at 6 per cent. interest, would only amount to $100 at the end of the period. The taking of interest in advance, although not true discount, has been regarded for a long period as legal.

11. The rule prevails everywhere that the parties may contract for the rate that prevails at the place where either party resides. Thus, if a lender resides in Ohio, where the legal rate is 6 per cent., and the borrower lives in Iowa, where the legal rate is 8 per cent., a contract would be legal specifying the higher rate of interest.[1]

12. Generally, a note is made payable at a particular place, but not always. When an omission occurs then it is payable at the place where it was made, and bears the rate of interest established by the law of the place of its birth.

13. When a note, bond or other security is paid in instalments, the interest may be computed in three ways. One way is to compute interest on the whole sum to the day of payment, and also on each instalment from the time it was paid to the time of making the final payment; and the difference between the instalments paid and the interest thereon, and the principal sum and the interest thereon, is the amount due. Another way is to compute interest on the whole sum to the time of the first payment, and add this to the principal, and then deduct the instalment; repeating the operation whenever an instalment is paid until the time of final payment. The objection to this way is, if the instalment is not equal to the interest earned and computed on the principal sum at the time of paying the instalment, interest is thereafter earned and computed on interest, and the creditor therefore receives compound interest. To

[1] If a bill or note bears usurious interest both by the law of the place where it was made and of the place where it was payable, the legal consequences of disregarding the law of both places to be visited on the offender are those of the place where the instrument was made.

obviate this objection the third way is to compute the interest on the principal sum from the time when interest became payable to the first time when a payment or payments with the interest computed on them shall equal, or exceed, the interest due on the principal. Then this sum is deducted therefrom, and future interest is computed in the same manner as before. By this method payments are applied, first, to reduce the interest, and, secondly, to diminish the principal of the debt; and the creditor does not receive compound interest. Many of the states, by statute, have established a mode of computing interest on obligations paid by instalments.

SUBDIVISION 8. DAMAGES FOR NON-FULFILMENT OF CONTRACTS

1. Guilty party is liable.
2. Deceit.
3. Passive concealment is not deceit.
4. To obtain redress what must be shown.
5. Modes of practising deceit.
6. It must be sufficient to influence a person.
7. It must be false.
8. Deceit in statements of directors.
9. Deceit concerning credit.
10. Deceit in use of trade-marks.
11. Deceit growing out of a partially false statement.
12. Non-liability when information is open to both parties.
13. Deceit concerning statements of law.
14. How fraud may be proved.
15. Damages in cases of written contracts.

1. In neglecting or declining to execute contracts one party or the other is often guilty of a legal wrong. In any event the guilty party can be compelled to respond in damages for not fulfilling his undertaking.

In other cases the failure to execute is excusable, or is the result of an agreement or understanding between the parties.

2. Deception or deceit is one of the wrongful elements surrounding or inhering in a contract. A person deceives another in making or not fulfilling a contract, and then the injured party may sue for damages for the wrong inflicted on him. The question in this large class of cases is whether the deceit is of such a nature that the law will recognise it and make the wrong-doer responsible to the other for the injury he has sustained.

A representation must be distinguished from a warranty. A warranty is a representation, but there are many cases of representation in which no warranty was made or intended. Setting aside the cases of warranty for consideration elsewhere,[1] we will take up the cases of representation pure and simple, and consider which are, or may be, the subject of a legal action.

3. A passive concealment or withholding of information does not always form the subject of an action. For example, a person learned of a declaration of peace between this country and Great Britain in 1815. Furthermore, he knew that the effect of this peace would be to greatly enhance the price of tobacco. Acting on this information, he bought a large quantity from a person who was ignorant of this welcome news, though, as the

[1] See Section 3, Subdivision 3.

sequel proved, it was not welcome to him. After making peace, the price rapidly advanced, and the seller was unwilling to execute his contract. His defence was deceit, but the court decided against him, saying that it was not the buyer's duty to impart his news to the other party; his ignorance was his own affair, for which the other was not responsible.

Another case may be given—that of a man who buys land knowing there is a coal mine underneath, of which the seller is ignorant. The buyer keeps his knowledge to himself until after the purchase, when the other, deeply chagrined, brings his action for deceit. Clearly enough, as there has been no deceit, there can be no recovery.

4. To obtain redress it must be shown, first, that there has been a false representation of something material; second, that the person who made it knew that it was false; third, that the other person to the contract who suffers thereby was ignorant of its falsity and believed it to be true; fourth, that it was made with the intention that the other party should act upon it; and, lastly, that the party thus acting has been injured. Thus, a person who is induced to endorse a promissory note before its maturity by reason of a false representation cannot maintain an action against the maker for doing so until he has been compelled to pay the note. All of these elements are needful to make out of the deceit a legal wrong.

5. Deceit can be practised in various ways. A nod of the head or some particular movement, silence, a sign, —in all cases there must be a clear act of some kind to

effect this purpose. The highest authority on this subject says that, to constitute a representation, it is not necessary, in using language, that the statement should be made in terms expressly affirming the existence of some fact. If the statement be such as would naturally lead the plaintiff, as a man of ordinary intelligence, to suppose the existence of a particular state of facts, that is as much as if statement had been made in exact terms.[1]

A fact must be stated. This must be distinguished from an expression or some half-vague knowledge. On this point the cases are often confusing. By the modern law a mere impression is not enough; in some way the plaintiff must have been misled by the other party, and intentionally so, to create such a representation as the law will recognise as wrongful.

6. The statement must influence the conduct of a man of ordinary intelligence. This point is of great importance. A person may go into a store with a view of purchasing a piece of cloth, and inquire of the seller the composition of the piece that pleases him. Suppose the seller, as often happens, is quite ignorant of the nature of the fabric in question, and should state wrongfully its composition, would the other person have an action for deceit against the seller? This depends on the question whether the buyer is deceived and suffers injury.

Mr. Bigelow says: "In ordinary cases the representation must be such as to influence the conduct of a man of average intelligence, but the courts do not turn over the simple-minded man to the prey of rogues. If a person

[1] Bigelow on Torts, § 121, p. 60, Seventh Edition.

is mentally deficient, or is but a child, the court will protect him from designing men where they would leave others to their own folly.'[2]

Two cases may be supposed, which doubtless happen every day. The one is that of an ignorant seller who unintentionally makes incorrect representations concerning the article of sale; the other is that of an intentional misrepresentation. In both, as often happens, if the buyer knows more about the subject of the sale than the seller, he is not deceived, and therefore has no legal action against the other—even though the seller may have lied deliberately throughout the transaction—for the simple reason that the buyer has not been deceived. It is not enough, therefore, to make a wrongful representation; it must be effective in deceiving and injuring the buyer in order to give him a right of action.[1]

7. A statement made by a seller with the view of influencing the buyer's conduct, and having that effect, if it is false and injures him, is actionable. To show that the statement was false either in law or morals will not suffice; an injury or damage must be proved to give a remedy. Such a statement may possess many different characteristics. Suppose a landlord should say to one who was negotiating for the purchase of his house, that he rented it for so much a year, when the truth was otherwise, the statement would be actionable. In like manner a statement giving the false age of a horse, or his speed, falls under the same head. Also, a statement concerning

[1] See § 12.

[2] § 133, p. 66.

the number of acres contained in a lot of land, if it prove to be false. These are a few examples from a large number of cases that might be given.

Moreover, the defendant cannot escape liability by showing that the words might be true if taken in a forced or unnatural sense. The other party has a reason for regarding the words in the sense in which they are ordinarily used, and this is the way the law looks at them as already stated.

8. Cases not infrequently occur in which a person permits his name to be used as a director or trustee of a company that issues a prospectus containing false representations. How far is such a representation binding on him? In other words, to what extent can he be made answerable for the damage done to the person, who, relying on such representation, has been led to enter into some business engagement resulting in loss to him. In one of the leading cases in this country it has been declared that, though such a prospectus be false, it does not impose on the director in law the duty to know the truth of the statement and to subject him to liability therefor. Of course, a director who knows that the prospectus is false would be liable for the consequences, but the law does not impose on him the duty of knowing whether a prospectus or other statement is true or otherwise.

This rule, however, is surrounded by some limitations. A director cannot always plead ignorance. In many cases it is his duty to know, and he is responsible if he does not ascertain the truth. Thus, while the law does not require a director to make a careful examination of

the bank reports sent to the national controller of the currency, to ascertain their entire truth, yet he cannot wilfully close his eyes and make no examination whatever concerning the truth of the statement.

The cases of false statements put forth by directors are multiplying. Some of the statements are made for the purpose of deceiving the public and enabling directors to dispose of their stock at an advantage. The law brands all such attempts as frauds, and those who make them are liable therefor.

9. Not infrequently persons are asked concerning the ability of others, or whether they are entitled to credit or not. Bank officials, for example, are frequently asked by customers desiring information of this kind. The books of late years contain numerous cases in which such information has proved to be misleading, and those who have depended thereon, perhaps in a fit of anger, have endeavoured to recover for their loss from the cashier or other person who has innocently drawn sellers into trouble. The courts have been quite uniform in declaring that, in such cases, the persons making such statements are not responsible or liable for an action in damages, except when the proof shows that they have intentionally misled others.[1]

Another example which may be given is that of a person who is about to supply a man's son with goods on credit, and who inquires concerning his property, and is told that he is worth $5,000; but the informant says nothing concerning the son's indebtedness. In one sense the answer given is correct; the son has this amount of

[1] See the recent case of Taylor v. Thompson, 176 N. Y., 168.

money; nevertheless, in another sense, the representation is false, and the person who makes it is responsible for his deception, should the other suffer thereby.

10. The long-continued exclusive use of a trade-name, though primarily intended to be descriptive of the quality of the product, entitles the user to protection against its unnecessary adoption and use by another which is calculated to deceive purchasers, the use having been retained for that purpose. Thus, a complainant had for eighteen years made and sold food products under the name of the Health Food Company. During this time the name had become widely known and identified with his products. Then another manufacturer of similar products adopted the name Sanitarium Health Food Company. The court decided that, although the use of the latter was accompanied by no similarity of packages and the place of the manufacture shown thereon was different, it was calculated to deceive purchasers and constitute unfair competition, as there was no necessity for its adoption. The complainant, therefore, had good cause against the other party for relief.

11. There may be deceit growing out of a partially false statement of a matter. For example, a man who is desirous of buying stock of a woman who knows nothing about the value tells her of a fact calculated to depreciate its value, but omits to tell her of other facts within his knowledge of an opposite character. This is a misrepresentation for which an action would lie.

12. A seller is not liable for deceit when the means of information are equally known to both parties as already

stated.[1] Thus, a person who goes into a store to buy a bushel of potatoes that are in a basket before his eyes cannot complain legally should half of them prove to be unsound, unless he inquired of the seller at the time of buying them, and their soundness was falsely represented.

(*a*) This principle has a wide application. Of late years the judicial tendency is to make a seller liable in most cases wherein it would not be easy for the purchaser to make an examination of the nature of the purchase for the purpose of proving or disproving the truth of the seller's statement. Thus, should a seller say to a buyer concerning a piece of land which was the subject of contract that it was free from encumbrance, and that the title was all right, and make other representations of like character, the buyer could ascertain the proof or falsity by making an examination of the records, if he pleased. Therefore, if he chooses, he can trust to the statement of the seller and hold him liable for any misstatements.

(*b*) It is not easy to distinguish between the cases in which the buyer ought to make some examination and those in which he is not required to make any. As time nowadays is an important element in the life of every person, he is not required to make examination in those cases where this cannot be done without considerable loss of time and inconvenience. But this rule does not apply to all matters. Thus, were the purchaser of a ship told by the seller that it was sound and correct in every respect, the law would, nevertheless, require the

[1] See § 6.

buyer to make some kind of examination. As the sale is important, the law imposes a duty on him to do something in the way of ascertaining the truth of the seller's statement.

(*c*) There are many cases in which the buyer is wholly ignorant of the nature and quality of the thing sold, and must trust to the seller's statement. This is particularly so in buying precious stones and other objects into the examination of which great skill or technical knowledge enters. In such sales the statement made by the seller goes farther than in other sales wherein the buyer also possesses some knowledge concerning the nature of the things purchased.[1]

(*d*) A seller who covers up a thing in such a way as to prevent the buyer from having as good knowledge as he himself possesses commits a wrong for which he is responsible. Thus, the owner of a ship who intentionally covers up defective places so that it will be difficult for the buyer to see them, and he is thereby misled concerning its worth, has an action against the seller for the fraud that has been practised on him.

(*e*) To a contract in writing this principledo es not apply. In such cases the court demands of both contracting parties that they should have knowledge of the instrument, and, if the buyer is misled, it is his own fault in not reading the paper. Surely, there is no ground for neglect or excuse for deception on his part.

13. Next may be considered the effect of misrepre-

[1] See Subdivision 3, § 6.

senting the law that applies to a proposed contract. Whatever representation a person may make concerning this is not binding in any way, and cannot be the subject of an action of deceit because it is presumed, for the safety of society, that all understand the law.

But a person having superior means of knowing the law, and professing to know it, though not a lawyer, who should knowingly give information to influence the conduct of an ignorant person, would be liable for an actionable misrepresentation. Thus, an old citizen who professes to be familiar with the land titles of the country meets an immigrant and proposes to sell to him a piece of land, assuring him that the title is good. It is true that the immigrant could examine the title, or employ an agent, and thus assure himself of its truthfulness. Should he, instead of doing so, trust to the representation, which should prove to be false, he would have an action against the person who made it.

14. Fraud may be proved in several ways: First, by showing that the defendant made a representation, knowing that it was false; second, that he made it recklessly without knowing whether it was true or false; third, that he made it positively of his own knowledge when he only believed it to be true without having actual knowledge; fourth, that he made it under such circumstances that it was his duty to know whether the representation was true or not.

15. The damages for not fulfilling a written contract depend on different principles. Very often the contract itself states what damages shall be incurred by its non-fulfilment.

§ 3. By Particular Contracts

SUBDIVISION 1. CONTRACT OF AGENCY

1. The relation of principal and agent.
2. A person can act as agent who cannot act for himself.
3. Agents are general or special.
4. In what ways authority may be given to agents.
5. Effect of repeating acts.
6. An agency may be established by adopting and ratifying a person's acts.
7. An agency may be established without disclosing the principal's name.
8. Description of several kinds of agents.
9. Authority and duties of a cashier.
10. And of other agents.
11. The authority of a general agent to make contracts.
12. What a general power implies.
13. The authority of a special agent to make contracts.
14. Authority must be properly exercised.
15. Authority of joint agents.
16. Effect of usage.
17. When authority to sell contains authority to warrant.
18. Authority to sell implies an authority to sell on credit.
19. Authority to sell on credit does not confer authority to collect.
20. Authority to sell includes authority to sell by sample.
21. Authority to receive payment.

22. Authority to collect is not authority to receive a note.
23. Authority to settle a claim is not authority to give a discharge for nothing.
24. What a principal may do after an unauthorised sale by his agent.
25. An agent cannot buy his principal's property.
26. An agent cannot appoint a subagent.
27. A principal may revoke his authority.
28. When a general authority may continue after revocation.
29. Neither can dissolve the relation in an unfair manner.
30. The degree of care that an agent must exercise concerning his principal's affairs.
31. An agent should keep an account of his doings.
32. Knowledge acquired by an agent relating to his business affects his principal.
33. How far notice to an agent affects his principal.
34. Invasion of rule in cases of agent's opposing interest.
35. The liability of a principal for his agent's fraudulent representations.
36. He is not responsible for his agent's criminal acts.
37. The wrongful act of a corporation's officers may be visited on it.
38. An agent is responsible to his principal for a loss arising from neglect of duty.
39. When goods wrongfully purchased by an agent can be taken by his creditors or principal.
40. Various ways by which an agent becomes liable.

41. If he wrongfully takes his employer's property the latter can recover it.

42. A person cannot hold an agent liable if he permitted him to act while he exceeded his authority.

1. Having described the general principles relating to contracts, the way is prepared for describing the principles that apply to persons in special relations, and the first of these is the relation of principal and agent. One of the peculiarities of modern business is the transaction of so much in a representative manner.

2. We may begin our inquiry by asking, what persons are competent to act as agents? This question is important for the reason that a person who is disqualified from making a contract on his own account can sometimes act for another. Thus, a person, under age, or a married woman, or an alien, may act as an agent, even though he or she is incapable of acting in any other manner.

3. Agents are of two kinds—general and special. A general agent is authorised to represent his principal in all of his business, or in all of a particular kind; a special agent is authorised to do only a specific thing, or a few specific things.

4. Authority may be given to agents in several ways. One of the ordinary modes is by writing, often under seal, called a power of attorney or procuration. In many cases an agent acts only by oral authority. An agent may be thus appointed, possessing authority to make a written contract, but he cannot execute one under

seal. To make a sealed contract he must be authorised by an instrument containing similar authority.[1]

5. Whoever deals with a person repeatedly employed to do specific things, for example, to sign bills, receipts, policies, or to make purchases, is justified in believing him to be authorised to do these acts with the consent and approval of his employer. But an agent who is usually employed to buy, though always for cash, possesses no implied authority to buy on credit. On one occasion a note was signed by the son of a member of a firm. He was at that time their bookkeeper and manager. It was not customary for clerks to give notes, though he had done so in some cases. The court remarked that a single act by a servant, without disapproval, has justified a person concerned therein in trusting him afterward. A principal is bound by the act of an agent no further than he is authorised to bind him, but the extent of an agent's power is ascertained from facts as well as words. The law often is that he who trusts must pay. In the case under consideration the clerk was an authorised agent for many purposes. Whether he had authority to make the note or not was a question of fact for the jury, and was decided by them affirmatively.

6. An agent's acts may become valid by the principal's adopting and ratifying them; and a corporation, like an individual, can bind itself by ratifying the acts of its agent. The ratifying of a contract necessarily implies the relation of principal and agent; and, in so doing, his authority relates back to the beginning of his exercise of it. No ratification is effective to bind a principal

[1] See Vol. I., Chap. III., Sec. 1, 320.

unless in the clear light of all the material facts, for the law does not presume that he will ratify the conduct of his agent in the dark. Generally, one who receives and holds the beneficial result of the act of another performed as his agent is not permitted to deny such agency.

Thus, should an agent sell under seal the property of a supposed principal, and receive payment and hand this over to him, he might avoid the sale and recover the property if he could show that the agent had no authority to sell it; but such principal could not do this and also hold the money. In other words, he cannot deny the acts of his agent and still retain the fruits of the transaction. Again, a principal who knows that another is acting as his agent, and does not disavow the pretender's authority as soon as he can, and permits a person to deal with him, is regarded as adopting or confirming his agent's acts. Nor can a supposed principal adopt a part of his agent's act and reject the rest. He must adopt the whole or none. Lastly, should an agent's conduct in selling his principal's property be ratified, so also would be his representations concerning the sale.

7. An unknown principal may show that one of the contracting parties was actually his agent. He may thus make himself a party to the contract, but, if the other contracting party has acted in good faith with the supposed agent, or paid him anything in cash or otherwise, he will not be the loser by the principal's conduct. In other words, so long as a principal remains unknown, he cannot make a party contracting with his supposed agent suffer by reason of his own silence or concealment. This would be contrary to reason. There are many cases of

this kind in which a principal, for some reason or other, prefers not to be known in transactions, and another person is employed to act for him. A principal who chooses to act in this manner may do so, but surely the other contracting party ought not to suffer through the principal's mode of doing business. Again, an undisclosed principal, after his discovery, may be liable on his contract. Lastly, one who sells to an agent knowing that he is thus acting, and chooses to charge the goods to him alone, cannot afterward transfer the charge to the principal.

8. There are many kinds of agents. Among the most widely known are factors and brokers, between whom there is a well-defined difference. A factor is a mercantile agent who sells and purchases and has possession of the goods; a broker is an agent of similar character not having possession of them. Consequently, a factor may act for his principal and yet in his own name, because the actual owner gives to him the appearance of an owner by delivering to him the goods, while a broker can act only in his principal's name. A purchaser of goods from a factor may set off against the price a debt due from him, unless he knows that they belong to another. But one who purchases goods from a broker cannot do this. Furthermore, a factor has a lien or claim on goods for the indebtedness of his principal to him, while a broker generally has not.

9. A cashier is another illustration of a general agent possessing all the authority necessary or usual for the transaction of his business. He cannot, however, bind his employer by an unusual or illegal contract. In one

of the cases the court declared that a cashier was allowed to present himself to the public as habitually accustomed to pay bills or notes of his bank, also to pay notes discounted by the directors, to receive payment of debts due to the bank, to receive money on deposit, and to pay the same to order of depositors. He is regarded as having possession of its books, notes, and other property, and as keeping its accounts and other records. In many banks these duties are performed in part by tellers, clerks, or assistants, but he might at any time perform them if he desired. As he is a general agent, so he can bind his bank while acting within the scope of his authority, though violating his instructions.

10. The same description, with some qualifications, applies to the agents of other companies or corporations. Their acts bind their employers or companies so far as they have authorised them, or have justified persons who deal with them in believing that they possess the authority exercised by them, or are acting within the general scope of their authority.

11. The authority of a general agent to contract is limited to the usual manner of accomplishing the business entrusted to him. Persons who deal with an agent carrying on a general business are not bound to inquire into the particulars of his authority. A person entrusted with the general management of a trade or business has an implied general authority from his employer to make such contracts as are usual and necessary in the ordinary conduct and management of the business. A foreman, for example, in a sawmill who took an order for a large quantity of lumber, and agreed to have it

ready for delivery within a particular period, bound his principal thereby, though no particular authority from him was shown authorising the agent to make the contract.

12. Furthermore, a general power implies whatever may be necessary for its complete execution. For example, a general sales-agent is competent to rescind a contract of sale with the consent of the other party. One who is employed by another to act for him in the usual business or trade of an agent, as auctioneer, broker, or the like, thereby acquires authority to do all that is necessary or usual in that business. Again, a person who puts his goods into the possession of another whose ordinary and usual business is to sell goods authorises the whole world to believe that the possessor has them for sale, and any buyer could hold them.

13. On the other hand, an agent who is authorised to do a specific thing, and exceeds his authority, does not bind his principal, because the party dealing with him must inquire for himself into the extent of his authority. The distinction, therefore, between the authority of a special and a general agent is very important. In the one case the principal is bound by all acts of the agent within the natural and usual scope of the business; in the other a person who is doing business with an agent must examine into his authority, and cannot hold his principal for any acts that exceed it. Of course, secret limitations are not binding on persons who are not acquainted with them.

Some illustrations may be given. An attorney who is authorised to convey a tract of land for his principal

after purchasing the same cannot agree to convey it in advance of his purchase, and should he do so could not properly execute his authority, and the purchaser would acquire no title. Again, an agent who is specially employed to receive payment in money cannot vary his authority by receiving a note.

14. Generally, an authority must be exercised with great strictness, otherwise the principal will not be bound, although his agent may be. When an agent's authority is in writing the instrument itself may be considered in order to ascertain the intention of the parties and the extent of the agent's authority.

15. A power to two cannot be executed by one of them. An exception to this rule exists in the case of a joint power exercised by public agencies. Thus, either of two factors, whether joint factors or not, may sell goods consigned to both; and when they are joint agents, whether partners or not, notice to one is notice to both.

16. In commercial matters usage may add to an agent's authority whatever may be required for the discharge of his duty in the most complete manner. Thus, an agent having authority to discount a bill, may endorse it in the name of his principal, unless he is expressly forbidden to endorse it. A broker who is employed to procure insurance may adjust a loss.

17. Authority to sell includes authority to warrant whenever the usage or custom of making sales with a warranty exists; also when the want of authority to warrant is unknown to the purchaser without his fault. For example, an authority to sell a horse implies an authority to warrant the animal, because horses are usually sold

in this manner. A general authority to transact business, or even to receive and pay debts, does not authorise an agent to accept or endorse bills or notes that will involve his principal. Indeed, authority to endorse is construed strictly, but such authority may be implied from the previous usage of an agent known and sanctioned by his principal. Thus, a confidential clerk was accustomed to draw bills for his employer, who authorised him on one occasion to endorse, and on two other occasions to receive money by endorsing his employer's name. The court declared that a jury might regard the clerk as authorised generally to endorse for his employer. This is an extension on very slight evidence of a clerk's authority.

18. An authority to sell implies an authority to sell on credit, if this be usual; otherwise, it does not. Consequently, should an agent sell on credit without authority from his principal, the latter may claim his goods from the purchaser, or regard the agent as responsible for the amount. An auctioneer or broker has no right to sell on credit unless authority is given to him expressly, or by usage. Furthermore, an agent is generally responsible who mixes the goods of his principal with his own in such a manner as to confuse them. He is also responsible whenever he takes a note payable to himself, unless this is authorised by the usage of trade. Should he take a note thus payable to himself and become bankrupt, it would belong to his principal.

19. Authority to sell on credit does not authorise an agent to collect money in the name of his principal. A purchaser, therefore, who should pay him would not

be protected and discharged simply by proving the agent's authority to make sales. But an agent to whom merchandise has been entrusted, with authority to sell and deliver, is authorised to receive money from purchasers. Otherwise the fraud on them, so the courts have remarked, would run into criminality.

20. A general authority to sell confers authority to sell by sample.

21. The payment of money to an agent binds his principal only when it is paid in the regular course of business. And payment to a subagent whose appointment was not authorised by the principal, renders the agent liable to his principal for the amount. Thus, a legacy left to a tradesman which was paid by the executors of the donor to one of the tradesman's clerks, who received payments daily, was not a sufficient payment to discharge the executors. A general agent who is authorised to receive money at a counter, or any person who is authorised to receive it at any particular place and in a particular way, has no authority for receiving it in any other place or way. Nor would a principal be bound by an agent, who, having authority to receive money, should discharge a debt without receiving it and give a receipt therefor.

22. An agent having authority only to collect a debt has no right to take a note for the amount from the debtor to himself, and thus substitute himself as creditor. But the ratifying of such an arrangement by the principal would bind him, and the debtor would be released from liability to the principal on the original claim. An agent employed to receive payment in money cannot

vary his authority by receiving a bill. And, surely, an agent cannot, without particular authority, commute a payment by receiving anything—a horse, for example —in discharge of a debt.

23. Again, an agent having authority to settle a claim against a carrier for the loss of goods cannot give a discharge without receiving a consideration. A mere agreement to receive other goods in the place of those lost would not release the carrier from liability. In a case in which this principle was decided the court remarked that a letter of attorney authorising an agent to collect a debt would not empower him to give a discharge on the receipt of the debtor's note. Still less would a clerk be authorised to release a liability for a claim without receiving any consideration whatever.

24. Nor can an agent entrusted with goods sell them without authority; should he do so the principal could affirm the sale and sue the buyer for the price, or disaffirm the sale and recover the goods from the buyer.

25. An agent who is employed to sell property cannot buy it himself unless he is expressly authorised to do so; nor can a trustee purchase property held in trust for another. But, of course, a principal may ratify and confirm a sale or purchase by his agent by accepting the proceeds and delaying to make the objection after the wrongful act is made known to him. Again, should a trustee or agent sell property, and buy it, not in his own name, but in the name of someone else the sale would be void.

26. An agent cannot appoint a subagent unless he is authorised to do so expressly, or by usage, or by the

obvious reason and necessity of the case, Thus, a consignee or factor for the sale of merchandise may employ a broker to sell when this is the usual course of business. A subagent appointed without such authority is only the agent's agent, and not the principal's. The principal, however, may authorise or confirm or ratify the subagent's act, and, when he does, the act becomes his own.

When a note or other obligation is sent to a bank for collection, which it sends to another bank nearer to the place where the debtor lives, is the first bank or immediate agent, or the second bank or subagent, responsible to the owner for any neglect pertaining to its collecting by the second bank? Two rules have contended for recognition. In most of the states a bank that exercises proper diligence and intelligence in selecting a collecting agent to do whatever may be necessary in relation to the collection, is not liable for his conduct. In New York, and a smaller number of states, a bank to which paper is sent for collection is responsible for the negligence of a subagent to which it may be sent. A similar rule has been established by the Supreme Court of the United States.

27. A principal, unless his agent is personally interested in the business, may at any time revoke his authority. His death operates in this manner. But an agent's death does not revoke the authority of a subagent appointed by the agent under an authority given him by the principal. Furthermore, the authority of an agent who has an interest—for example, a person who has authority to sell goods and apply the money to his own benefit—cannot be revoked by the principal, wherever the execu-

tion of the agent's authority is needful to make his interest valuable.

28. A general authority may continue to bind a principal after it has been revoked, when the agency was known, and the revocation was wholly unknown, to the party dealing with him without such party's fault.

29. As a principal may revoke his agency, so may an agent withdraw at pleasure; there is a limitation on both sides; neither can exercise this power in an unfair, injurious manner that circumstances will not justify. Damages, therefore, may be recovered, should an agency cease in a way that injures the other party.

30. An agent is bound in his principal's affairs to use all the care and skill that a reasonable man would use in his own. He must also act in good faith. He cannot make a profit from his principal for whom he has undertaken to act. But an agent who acts gratuitously, without legal right to compensation for his services, will be responsible for no other negligence than that of a gross character. The varying degrees of negligence have often been the subject of judicial controversy, and it is by no means easy to distinguish between them. The shades are almost imperceptible, and no guide besides the general principle can be furnished to determine the legality of the acts of an agent in any particular case. It must be left for the consideration of a jury to determine whether the negligence is of a kind, or not, for which he is responsible.

31. An agent should keep an exact account of his doings, especially of his pecuniary transactions. After a reasonable time has elapsed a court will presume

that his account has been rendered, accepted, and settled. Otherwise every agent might remain liable on his account. Again, he is liable not only for the balance in his hands, but for any interest that has accrued.

32. An agent represents his principal in receiving information affecting his business. Therefore knowledge acquired by an agent in the course of his business is regarded as the knowledge of his principal. It is supposed that he will inform his principal of everything that will be useful to him; if he does not, nevertheless his principal is regarded as having gained the information from him, because he is acting as his principal's servant, and the law assumes he is doing his duty. At all events, if he is not, of two innocent persons who must suffer, his principal, who has appointed him, must be the loser through any failure of the agent in duty.

33. The law concerning notice or information given to an agent has a very wide application. Notice to an officer or member of a corporation is regarded as notice to the corporation whenever, either by appointment or usage, he had authority to receive it. Not in all cases, though, is notice to a member of a corporation notice to the corporation itself. Many cases have occurred in which the question has arisen whether or not an officer held such a relation to a corporation that information to him should be regarded as a notice to the corporation of which he was an officer or employee. Thus, information to the cashier of a bank concerning the protest of a note, for example, would unquestionably be considered notice to the institution; but such information conveyed to a director would not be considered notice to the institution,

for the reason that it is not within his province or duty to attend to such matters. Many questions of this kind concerning notice arise in business. The tendency of the law is not to widen the province or duty of officers to convey information to the institutions with which they are connected, and the reason is very sound—their duties might become too burdensome.

There is a pretty clear line between advisory officers and those whose duties are of an active character. The general officers of an institution, those who are employed in its actual management, are clearly held accountable for all information touching the business of the institution they represent, and information conveyed to them is regarded, and properly so, as information conveyed to the institution itself.

34. An invasion of this rule occurs whenever the agent's interest is opposed to that of his principal; the law assuming that the agent will then be silent. This rule is frequently applied, especially in transactions wherein the agent is deeply concerned in perpetrating a fraud.

Thus, a depositor receives his bank-book, and his checks and other vouchers, from the bank. The depositor looks them over on their return from the bank, and supposes they are correct. In ordinary cases such action on the part of a depositor would prevent him from making reclamation upon the bank on the discovery of his secretary's fraud or mistake, should he neglect to do so after a reasonable period. Should it appear, however, that his secretary has committed a fraud on him by forging checks and, on the return of the book, has stolen some of them or so changed them as to make

an examination by the depositor fruitless, then in some states he would not be precluded from recovering against the bank on the discovery of the truth, for the simple reason that the conduct of his agent would not be binding on himself. But in other states it has been held that a depositor should examine his pass-book himself, and if, instead of doing so, he delegates the duty to another, he is responsible for the consequences.

Again, an agent who represents two principals and concocts a scheme against one of them is presumed to have made no disclosure of his intention to the other principal. An independent fraud committed by an agent on his own account is beyond the scope of his employment and is analogous to a fraud wilfully committed by the servant for his own purposes, and not as a means of performing the business entrusted to him by his master.

The treasurer of a corporation was also vice-president of a bank and its general manager. As treasurer of the corporation he made two promissory notes which were discounted by the bank and credited to the corporation. On the same day, as treasurer, he drew a check and charged the amount to the corporation on the books of the bank. With the proceeds of the check he purchased two drafts of the bank drawn by him on its New York correspondents, signing them as vice-president of the bank and drawing them to his own order. He received payment of the drafts in currency, and used the proceeds for his own private purposes. Subsequently, the bank sued the corporation on his promissory notes and recovered, the court holding that, in thus acting as treasurer,

he kept within his authority, and the corporation was liable for the loss.

35. Passing from the effect, on a principal of notice conveyed to him through his agent, we may inquire into the effect, on him, of a fraudulent representation made by his agent in conducting his business. Though he may be personally ignorant and innocent of the wrong, he is liable and cannot retain any benefit from his agent's representations. And whenever he does retain the benefit he cannot disavow the representations, and shield himself behind the plea that the person was not acting for him. By retaining the fruit of his agent's act he becomes responsible for the act itself.

A principal is also liable for a material representation made by his agent which he believes is true, but which the principal knows is false and does not correct. A sale made under such circumstances may be avoided by the buyer.

36. Though a principal may be responsible for the deliberate fraud of his agent in executing his employment, he is not responsible for his criminal acts, unless he expressly commanded them. But there are occasions on which he has entrusted property to his agent who has used it illegally, yet rendered his principal liable criminally without proof of direct participation in the act; for example, in smuggling goods.

37. Once it was considered that an agent of a corporation who did a criminal thing was, indeed, responsible therefor, but not the corporation itself, because it was not capable of doing an immoral thing. Its nature was peculiar; it was not endowed with a moral quality. But

the law has long since seen the necessity of regarding a corporation in a different light, and the wrongful acts of its officers are often visited on the institution itself. For example, an officer of a bank has no right to lend more money to a customer than the law prescribes, or to take security that is forbidden; nevertheless, if a bank receives the benefit of his act, it is punishable therefor, and the good of society requires that this should be done. Consequently, for all acts of this character that are done with the intention of benefiting the institution, although they are not within the legal scope of an officer's authority, the institution itself is responsible.

Every agent is entitled to indemnity from his principal when he acts in obedience to lawful orders, or when he does an act that is not wrong in itself, which he was induced by his principal to regard at that time as right.

38. An agent cannot disregard the instructions of his principal without making himself liable to him for the consequences. In ascertaining or defining the extent of his instructions, custom or usage often has great influence, because, on the one hand, an agent is entitled to all the advantages usage gives him, and, on the other, a principal has a right to expect that his agent will conduct himself in harmony with the usages of his business. But usage never prevails over express instructions. A principal who accepts the benefit of an act performed by his agent beyond his instructions relieves his agent from responsibility therefor.

39. Again, goods purchased through fraud and in the principal's name, as a means for deceiving creditors, may be taken and sold for the agent's debts. But the princi-

pal, by affirming his agent's acts, may make the goods his own despite his agent. And he may repudiate the purchase of goods bought without his authority, and yet hold them as security for the money advanced or paid by his agent.

40. Generally, an agent may make himself liable by his agreement, or by going beyond his authority, or by going differently, or by concealing his character as an agent, or by his own bad faith. If an agent should execute an instrument that would hold him personally, he cannot clear himself by showing that, in fact, he signed it as agent, which was known to the other party. The reason is, this would vary the terms of a written contract by oral evidence, which the law will not permit to be done except in cases of fraud, accident, or mistake. To permit this generally would destroy the certainty of written contracts.

41. The principal of an agent who embezzles, or wrongfully takes his employer's goods, may recover or reclaim them if they can be traced and identified. If they become blended with the agent's own goods and he should die or become insolvent, his principal could claim only as a common creditor.

42. An agent who exceeds or disregards his authority, and this is known by a person dealing with him, he cannot be held personally liable; if not known, the agent is liable on the whole contract, although he may have authority to execute or perform only a part of it. A person who has no authority, and acts as agent, is personally responsible. But an agent who should exceed his authority ignorantly would not be personally liable

except to an innocent party dealing with him, who would otherwise suffer loss.

SUBDIVISION 2. CONTRACT OF SALE

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33. The same subject.
34. Effect of the denial of the existence of a contract of sale after it has been partly performed.
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36. Effect of fraud in making sales.
37. A buyer may cancel a contract when fraud has been practised on him.

38. And a defrauded seller may sue for the loss he has sustained.
39. What is a waiver of a right to cancel it.

1. A person cannot sell a thing he does not own. If he has merely the right of possession to goods, has hired them, or has possession only, as in the case of stolen or found goods, he cannot sell them and give a good title against the owner. And if he pretends so to do the owner can recover them from the purchaser, though he was wholly ignorant of the seller's defective title at the time of purchasing. In other words, only a person who has a right to merchandise can sell it, because the sale must transfer the right of ownership from the seller to the buyer.

2. Thus, a contract was made with a farmer for the use of a yoke of cattle for one year; at the end of that period they were to be returned. The hirer also had the privilege to pay a price named and keep them. As the cattle were sold during the year by the keeper or bailee without paying the price, the sale did not pass the title, and the owner could reclaim them.

3. Negotiable paper is an exception to this rule. Whenever this is transferable by delivery a purchaser in good faith acquires a title thereto, even though he has bought it of a thief, or of a finder. But the owner only of all other things can legally part with them, and a thief or finder who should attempt to give a good title would fail, and the true owner could recover them. An owner, however, who sells a thing, although he was deceived and induced to do so through fraud, cannot reclaim it

from another who, in good faith, bought it from the defrauder.

4. Assuming that the possessor of goods is their owner, and competent to sell them, what must he do to accomplish this purpose? He must agree with another competent party for the transfer of their ownership from himself to the buyer for a fixed price. If the ownership be transferred the goods are sold; if the ownership be not transferred they are not sold.[1] The completion of the sale does not depend on their delivery by the seller, or on the payment of the price by the buyer, but on a change of ownership. By the mutual assent of the parties the buyer immediately acquires the ownership and all the rights and liabilities of ownership, so that, should any loss or depreciation of the articles purchased occur, the buyer would be the sufferer. On the other hand, he would be the gainer by any increase in their value.

5. The parties may expressly agree to the giving of a credit that will bind the seller, or this may be inferred, or implied, from usage or from circumstances. The delivery and acceptance of goods, or the payment of money for them, or a receipt from a seller of what is known as earnest money, are acts from which courts are justified in inferring that a sale has been effected. But neither delivery, nor earnest money, nor part payment, is essential to the completion of a contract of sale. This is the

[1] "If the vendor agrees with the vendee to transfer the absolute property in the thing to the vendee for a money price, the contract is complete and binding on the parties. The vendee becomes entitled to the specific chattel, and the vendor has a right to the price agreed upon." 55 Mo. App., 369.

common law, which has been somewhat changed by the statute of frauds, as we have already learned.

6. When a sale relates to an entire thing no question can arise concerning its identity. But when it forms part of a general mass a sale is not complete, and no ownership is transferred, until the thing sold is separated, ascertained, or identified. Thus, D bought of H 300 barrels of oil that were to be delivered "on first water," and paid the purchase money for it. H pointed to a large quantity of oil, and requested D to select the quantity he had purchased. He went away without selecting or separating the quantity purchased. A flood afterward swept away all of H's oil, and D afterward demanded delivery of the 300 barrels he had purchased, which H refused to deliver. It was decided that the sale had not been completed, and consequently that no title to the oil had passed to D.

7. The difference between a sale and an agreement for a future sale may now be considered. Every sale is a complete or executed contract, although there may be no payment or delivery of the thing purchased. But the contract itself is complete; nothing remains unfinished. An agreement for a future sale is a contract to sell, which is to be executed or carried out at a future time, and is called an executory contract, in distinction from a sale, which is an executed or completed contract. A sale is completed by a transfer of the ownership of specific goods or other things; *to complete* an agreement for a future sale, the thing forming the subject of the contract must always be *delivered* and, in some cases, though not always, accepted.

8. An illustration of an executory contract, or agreement for a sale, may be given. A contracted to sell to B a quantity of leather that was then in vats in the process of tanning. The hides could have been removed at the time of making the contract. They were to be delivered, however, about three months afterward. It was decided that no immediate ownership in them passed to the buyer, and that the leather belonged to the seller, and could be taken by his creditors. This was declared to be so notwithstanding the fact that it had long been the course of business for curriers to purchase leather of tanners while it was in the process of manufacture, which was to be delivered when the tanning was completed; and that advances were frequently made on such purchases. Justice Gibson declared that an agreement for a subsequent delivery was essentially executory. The property in an article made to order passes only by its delivery, because, at the time of ordering it, there is no property in anything to pass; the accidental existence of a part of the thing at the time does not give the customer a specific right to the whole.

9. A contract for the future sale of a thing does not, on the arrival of the time for executing it, or happening of the event mentioned, become a sale, transferring ownership. The buyer does not then acquire it, and cannot, by tendering the price, acquire a right to the possession; he may tender the price, or do whatever his obligation requires, and then sue the owner for not observing his contract and delivering the machine or other thing, but the ownership of the article is still that of the original owner.

10. For the same reason that the subject of a sale must be in existence, the ownership of goods that have no existence at the time of their sale cannot be transferred. Thus, in contracts for a sale of articles that are to be manufactured, as the subject of the contract is not in existence when the parties made their agreement, no ownership passes until the thing to be manufactured is completed, and has been delivered and accepted by the person giving the order.

11. One's ownership of a thing is not changed by a sale and delivery on conditions that are to be performed afterward but which are not; but is changed when the delivery is absolute and the bargain is perfect, or can be made so by reference to something else. For example, it is certain enough when the price can be obtained by mere computation. Therefore, a sale of a large raft for so much per thousand feet and delivered to the buyer, changed the property, though the computation was not made.

12. The law presumes that a sale is to be followed immediately by payment and delivery, unless the parties shall otherwise agree. In other words, the law supposes that the seller intended at once to deliver, and the buyer, in like manner, to pay for the goods purchased. If, therefore, the buyer departs without paying or tendering the price, the seller may consider that there has been no sale; and, consequently, should the buyer come at a later period, and offer the price and demand the goods, the seller could refuse to part with them. Or, if the person to whom the offer of sale is made accepts the offer, but still refuses or neglects to pay the price,

and there are no circumstances indicating a credit or justifying the refusal or neglect to pay, the seller may disregard the acceptance of his offer. It would, however, be a proper thing for the seller to demand payment of the price before he treated the sale as void, and a refusal to pay for the thing sold would then give him at once a right to regard the goods as his own. Should the seller unreasonably neglect or refuse to deliver the goods sold the buyer would thereby be justified in supposing that no sale had been made, or that it had been annulled or avoided.

13. Neither party is required to act thus in consequence of the refusal or neglect of the other. As a sale actually has been made, the seller may sue the buyer for the non-payment of the money due to him, or the buyer may sue for the non-delivery of the merchandise. Either party has an election of this nature that he can exercise. He may consider that the contract is ended by the neglect of the other party to do what is required of him, or he may regard the contract as alive, and seek to enforce it.

14. Should the buyer neglect or refuse to take the goods and pay the price within a reasonable time, the seller can resell them, and give notice to the buyer that he looks to him for the deficiency, if there be any, from the failure on his part to take the goods and pay for them. In making such a resale the seller acts as agent or trustee for the buyer, and his proceedings will be governed by the rules that relate to persons acting in such a capacity. One of these is that he must use due care and diligence, and act in perfect good faith. And again, the receipt of money after the time for delivery, on

account of the contract, will not prevent the seller from recovering for the loss he has sustained. In a case involving this principle the court remarked that a resale was the usual mode of ascertaining the difference between the contract price and the value of the article when the buyer refused to accept it. But it is not the only mode. The law has no single mode for settling the value of an article in the market at a given time.

15. The owner of goods sold on credit at public auction, but which the buyer refuses to take, can maintain an action in his own name against the buyer, before the credit has expired, for not observing his contract. The damages or sum that may be recovered is the difference between the price that was to be paid and their value at the time of the buyer's refusal to take them. This may be ascertained by a resale at the buyer's risk, but some other mode of estimating the value of the loss may be adopted.

16. Important questions sometimes arise concerning the restrictions on sales of goods that are resold. How far are the restrictions binding on the secondary purchasers, especially when they know nothing about them? This question arises the most frequently after the sale of copyrighted goods, the secondary purchaser seeking to escape from the restrictions that bound the seller. It has been decided that a stipulation, in a contract for the sale of a proprietory medicine sold under a registered trade-mark, that the purchaser shall not sell it for less than a specified price, does not follow the medicine into the hands of a subsequent vendee, and he cannot, therefore, be prevented by the manufacturer

from selling at less than the stipulated price, although he knows that the manufacturer sells only at that figure.

This rule is founded on the principle that a restriction on the right of the owner of personal property to sell or use it does not run into the hands of a purchaser from him, whether he knew of the restriction or not. In other words, a covenant concerning personal property binds only the maker and his personal representatives, and does not run with the property like covenants relating to land.

One who purchases a copyrighted article, therefore, from the absolute owner may sell or use it exactly as he pleases so far as the copyright law is concerned, notwithstanding any restriction attempted to be imposed on the vendee; but if he purchases from one who is a mere agent for the sale of the article, the restriction is binding on him. But if an agent has agreed to sell under certain instructions, which are unknown to his customers, they are not bound by them; the wrong is that of the agent who alone is responsible.[1]

Again, should the owner of a copyright transfer the title covered by the copyright to damaged books, by an agreement whereby the books are to be used as paper stock only, the seller cannot, by virtue of the copyright

[1] In Clemens v. Estes, 22 Fed. 899, the court said: "In the absence of any notice of the contract, the defendants had a right to buy books from agents who lawfully obtained them by purchase from the plaintiff or h publishers, and had a right to advertise for sale and to sell such books any price they saw fit. The plaintiff may have a ri ust agents for the violation of their contract, and, fr t might be enjoined from doing what they had c valuable note, 55 L. R. A., 631.

statute, restrain the sale of such books by the purchaser in violation of the agreement.

17. What is a proper and sufficient delivery of goods sold is not always an easy question to answer. In general, it is sufficient whenever they are placed in the buyer's hands, or in his actual possession, or whenever action is taken that is equivalent to a transfer of possession. Thus, after landing goods on a wharf alongside of the ship that brings them, and notifying the buyer, this is a sufficient delivery. Usage is often of the utmost importance in determining the true answer. In general, a delivery is sufficient that puts the goods within the actual reach or power of the buyer with immediate notice to him, so that there is nothing to prevent him from taking actual possession of them.

18. When from the nature or situation of goods an actual delivery is difficult or impossible—for example, timber floating in a boom-slide—such acts as touching it, or going near and pointing it out, complete the delivery.

19. Once a contract was made for the delivery of timber of a particular description that was delivered, but never completely accepted, because it was defective. It was decided that the buyer should have offered to return the timber soon after the deficiency was discovered; or, at least, within a reasonable time after the discovery, should have given notice of his intention of not accepting it. If this is not done, and the timber is carried off by ice or other accident, the seller may recover its value.

20. In delivering portable articles, neither time nor place of delivery having been mentioned, the rule is, they must be delivered at the place where they are at the time

of the sale—the store of the merchant, the shop of the manufacturer or mechanic, or the farm or granary of the farmer where they are kept. When a time for delivering them is fixed by the contract, the seller must seek the buyer at his residence, and there tender the articles. If they are heavy or cumbersome the seller must seek the buyer a reasonable time before the day of delivery, and ask him to appoint a place for delivering them.

21. On the sale of things at sea an endorsement and delivery of the bill of lading or other instrument is sufficient to complete their delivery, and the buyer, in like manner, can transfer them to another by his own endorsement and delivery of the bill of lading. The seller should send or deliver the bill of lading to the buyer within a reasonable time; and his refusal to do this has sometimes justified the buyer in cancelling the sale.

22. A delivery of a fixed quantity of merchandise is not completed by a tender of a bill of lading for a larger quantity. If anything remains to be done—for example, separation from a larger mass before it can become the property of the other party—there can be no tender or delivery until after the separation has been made. The ownership of the thing tendered is transferred to the person to whom the tender is made whenever he is under an obligation to receive it.

23. The question of delivery is sometimes important from another point of view. Not infrequently goods are sold by persons who are on the verge of bankruptcy in order to prevent them from coming into the possession of their creditors, who, notwithstanding, keep them as if no sale had been made. As goods are usually trans-

ferred soon after they are sold, when this is not done, the transaction is generally regarded as a fictitious sale for some unlawful purpose like that just mentioned. In such a case, should a third party without knowledge of the sale purchase the goods from the seller, he would gain a valid title by acquiring possession of them, and could hold them against the other pretended purchaser. Again, unless delivery or possession accompanies the transfer of the right of property, the thing sold may be taken by the creditors of the seller. In other words, while he retains possession of his goods, he is regarded ordinarily as the owner, and they may be taken by proper legal proceedings by his creditors. His retention of them may be explained, and if this be perfectly consistent with honesty, and especially if the delay in transferring their possession was brief, the title of the first buyer would be respected.

24. Until a delivery of goods has been made the seller is bound to keep them with ordinary care. Having observed this, he is not liable for any loss or depreciation, unless arising from some defect that he had warranted did not exist. Thus, A sold a quantity of beef to B, who paid the purchase money. It was agreed between them that the beef should remain in A's possession until it was sent to another place. Some time afterward B received a part that proved to be bad, and an inspection disclosed the unfitness of the entire quantity. The court decided that, as the beef was good at the time of the sale, the buyer must bear the loss.

25. Sometimes goods are sold in a shop or store and put into a parcel, or otherwise made ready for delivery

to the buyer in his presence, and he requests the seller to keep them for awhile. In such a case the property in them passes, and the seller becomes the bailee, or keeper of them for the buyer. Consequently, their loss while in the seller's possession, without his fault, would be the buyer's.

26. The seller must send the goods in the way directed by the buyer. Having complied with the seller's direction and exercised ordinary care over them until their delivery to the agent of the carrier, the seller's responsibility is ended as completely as if they had been put into the hands of the owner.

Should the buyer neglect to give directions the goods must be sent in the ordinary way, or as usage has determined. Generally, customary and proper precautions should be taken to prevent loss or injury in transporting them. If this is taken the goods are sent at the buyer's risk, and the seller is not responsible for any loss. But he is responsible should any loss or injury happen in consequence of neglecting to take such care or precaution. Should he send them by his own servants, or should he carry them himself, they would be in his possession and at his own risk until delivery.

27. A seller has a right to retain possession of goods sold, unless they are sold on credit, until the price is paid. This right is called a lien, which means a right to retain possession of them until some charge on them or some claim against them is satisfied. But he loses his lien whenever he voluntarily parts with their possession, or by their delivery to another. Furthermore, the delivery of a portion is regarded as a delivery of the whole; or a

symbolical delivery—for example, the delivery of the key of a warehouse in which goods are stored—transfers the right of possession of them to the buyer.

28. As the seller, by delivering goods to the buyer, loses his lien, so, he cannot afterward retake and hold them, should the buyer fail to pay for them as he has promised. He can, though, by agreement, retain his ownership. At the time of delivering them, if the buyer agrees that the seller's ownership shall be preserved until he has paid for them, the agreement would be valid, and the seller could reclaim his goods, if he desire, *from the buyer.*

29. While goods are in the possession of the seller or of his agent, or are in transit from him to the buyer, he has a right to refuse or stop their final delivery on learning that the buyer is in failing circumstances. This is an old rule of law, and the reason for it is plain. It is to save the seller from loss. Why should he deliver his property to an irresponsible person, or to one who is unable to pay for it? The law does not require him to do so unreasonable a thing.

30. A buyer who knowingly receives goods so deficient or so different from what they should have been that he might have refused them waives the objection, and is liable for the whole price unless he can show a good reason for not returning them, as in the case of materials that are innocently used before discovering their defects. Thus, a man bought a chandelier that was warranted sufficient to light a room of defined dimensions. After keeping it for six months he desired to return it and refused to pay for it. The court declared that he had

kept it too long, although it was not sufficient for the purpose, and not as good as the warrant specified. Sometimes two or three months, or even a shorter period, is regarded as too long to permit a return of the thing purchased. How long it may be kept must depend largely or principally on the nature of the thing and the use that is to be made of it. Though the buyer cannot return it, yet, when the price is demanded, he may set off the injury he has sustained by reason of the seller's failure to fulfil his promise. The seller, therefore, cannot recover the entire price, but only the value of the thing sold to the buyer. But a long delay or silence may imply that the buyer has even waived the right to demand a reduction.

31. In a contract of sale there is sometimes a clause providing that a mistake in the description, or a deficiency in the quality or quantity, shall not avoid the sale, but only give the buyer a right to make a deduction or to demand compensation. Nevertheless, a great mistake or defect, affecting materially the availability of the thing for the purpose for which it was bought, would render the sale void, because the thing sold is not the thing the buyer desired and which ought to have been furnished. Of course, it is not easy to determine this mistake or defect, or what must be regarded as a non-compliance with the contract so far as to justify the buyer in refusing to receive the goods. Like many principles of law, while the principle is clear enough, its application must depend on the facts in each case.

32. On some occasions many things are ordered at one time and by one agreement. In such cases generally,

the buyer may refuse to receive a part without the rest, but, if he accepts any of them that is severed from the rest, he will be regarded as having given a separate order for each thing, and is required to receive them as they are tendered, unless some distinct reason exists for refusing to receive them. The purchase of each thing at an auction, by different bids, and especially after marking the name of the buyer against each thing, is regarded as independent of the others. But the buyer of several things related to each other, no one of which would have been bought without the others, is not obliged to take one or more unless he can have all. The question whether it is one contract, so that the buyer shall not be bound to receive any one thing unless all of them are tendered to him, must be determined by ascertaining from all the facts whether the things belonged together. Should the conclusion be reasonable that no one thing would have been purchased without the others, then they must be taken together, otherwise each thing may be regarded as purchased separately. The buyer may have, by the terms of the contract, the right to redeliver the things purchased. For it is often agreed that the purchaser may retur th goods purchased within a fixed or reasonable time. He may also have the right to return them if they prove to have, or not to have, certain qualities, or on the happening of a specific event. In such cases the buyer must prove that the circumstances existed that justified him in returning the things purchased. Furthermore, in such cases, the property in the things purchased passes at once to the buyer as in ordinary sales, subject to his right to return them,

given to him by the agreement. If he does not exercise this right within the agreed time, or within a reasonable time, should none be fixed by agreement, the right to return them is wholly lost; the sale becomes absolute, and the price of the goods may be recovered. Again, if, during the time the buyer has them in his possession, they are so misused as to impair their value, he cannot tender them back, and is liable for the price.

33. If a contract for the delivery of lumber, for example, be an entire one, the party who is entitled to it may accept a partial performance, and the contractors have a right to recover for the lumber thus delivered. On the other hand, if the remainder is not delivered the buyer may set off his loss or damage occasioned by the non-fulfilment of it.

34. When two persons enter into a contract, and, after a partial performance by one of them, the other denies its existence and gives notice of his intention to disregard it, the other party may, at his option, perform it fully and enforce it, or consider it at an end and recover for what he has done.

35. As the law does not require anyone to do a forbidden thing, no contract can be enforced that is illegal or contrary to law, or that is tainted with illegality. When, however, the illegal can be separated from the legal parts, this may be done. Thus, should a person agree for a thousand dollars to sell and deliver a quantity of merchandise and also to assist the buyer in some contemplated fraud, he would be bound to sell and deliver the goods because the consideration was legal and this part

of the promise also, but he could not assist in the fraud, because this part of the promise was illegal.

36. Fraud vitiates and avoids in law every contract and every transaction. Consequently, an unlawful representation by which a sale is effected, or a purchase of goods with the expectation of not paying for them, or hindering others from bidding at auction by wrongful means, or selling at auction and providing by-bidders to increase the bid, or selling "with all faults" and then purposely concealing and disguising them, will avoid a sale. No title or right passes, and the innocent party, whether buyer or seller, may insist that the fraudulent party shall not take advantage of his own fraud to avoid the sale. On one occasion a man advertised a ship for sale at auction with all faults, but purposely put her in a position where an important fault could not be easily detected. This act avoided the sale.

37. A buyer on whom a fraud is practised has a right to cancel the sale, but he must do this within a reasonable time after discovering the fraud. The delay must be brief unless he can show a good excuse.

38. On the other hand, a defrauded seller may cancel the sale and sue for the price of the thing sold. If, however, the fraudulent buyer gets the goods on credit, and the seller sues for the price of them before the credit expires, this is a confirmation of the sale, including the terms of credit. Consequently, he thereby waives the right to cancel the sale, and he has no right to demand the price until the period of credit has wholly expired.

39. Whenever a party who has been defrauded by any contract brings an action to enforce it, this is a waiver of

his right to cancel it, and is a confirmation of the contract. One may inquire, what then ought to be done in such a case? Plainly, he should sue to recover for the injury he has sustained, but he ought not to recognise the contract itself.

SUBDIVISION 3. CONTRACT OF WARRANTY

1. Sales with an express warranty.
2. Illustration of a warranty.
3. What language or conduct is a warranty; estimates.
4. A warranty may be expressed or implied.
5. The law does not imply a warranty from a full price.
6. How the law regards the vendor's superior knowledge.
7. Affirmations of quantity and quality.
8. A mere representation is not a warranty.
9. Illustration of the principle.
10. Adulteration.
11. There is an implied warranty by the vendor of title.
12. Also in kind with the commodity sold.
13. Also that goods are like the sample.
14. Also of a thing supplied for a special purpose.
15. Is a bill of sale a warranty that the article conforms to the description?
16. The rule concerning provisions.
17. When the buyer can return the goods sold with a warranty.
18. The sale of one's business.

1. Next may be considered sales that are made with a warranty. By this is meant a statement of some kind

that forms a part of the contract. A warranty may be general, or particular and limited. A general warranty does not extend to defects that are known to the purchaser, or that are open to inspection and observation, unless the purchaser at the time is unable to discover them readily, and relies rather on the knowledge and warranty of the seller.[1]

2. A contract to deliver iron, for example, made in a particular place, in consideration of a sound price that is paid, is fulfilled by delivering iron made there which the party believed was good, though on trial it proved to be positively bad. The court remarked, in a case of this nature, that the buyer was evidently content, at the time of making his contract, to take his chances that the iron would be of good or bad quality, provided it were made of metal selected honestly for that purpose from the place mentioned. By way of additional illustration, a sale was made of a number of kegs of lard grease, a part of which was inspected by the purchaser before making his purchase. He declined to examine more. He received a bill of sale in which the article was invoiced or described as lard grease. There were no false representations, nor was any deceit practised, nor did the seller know of any defect in its quality, although a portion proved to be of an inferior quality. Nothing could be recovered.

3. On the sale of a quantity by estimation, and without deception, each having equal means of judgment, the vendor cannot recover, should the quantity prove to be less than his estimate, or the seller, should it prove to

[1] Subdivision 8, of Sec. 1, of this chapter should be read in connection with this subdivision.

be more. "After the funeral has passed the dead cannot be resurrected."

4. A warranty may be either express or implied. "Any affirmation," says Beach, "of the quality or condition of the thing sold, made the seller at the time of sale for the purpose of assuring the buyer of the truth of the fact affirmed and inducing him to make the purchase, if so received and relied on by the purchaser, is an express warranty."

An implied warranty is created by law—for example, that the possessor of goods who offers them for sale as his own has a title to them.

5. The law generally does not imply a warranty from the fact merely that a full price is paid.[1] The maxim of the law "caveat emptor," let the purchaser beware, prevents this. As a general rule, mere silence on the seller's part is not fraud; but, if the usage of trade requires that a declaration of defects should be made whenever they exist, his silence is regarded as a warranty against them. Simple declarations of opinion are not a warranty.

6. There is a marked tendency to depart from this rule in sales of articles of which the seller is presumed to have a knowledge superior to that of the buyer—*e. g.*, jewels, medicines, and the like. "In this class of cases, the buyer and the seller do not deal on equal terms. The vendor is professedly an expert."[2]

7. Affirmations of quantity or quality that are made during negotiations for sale, to effect that end, which are

[1] Except in South Carolina and Louisiana.

[2] See § 10, Subdivision 7, of this chapter.

successful, are a warranty. Thus, in New York, a representation was made by a seller that his flour was superfine, or extra superfine in quality, and worth a shilling more a barrel than common flour. To this statement the seller added another: that the buyer might rely on his representation. This was regarded as a warranty of the quality of the flour. In another case the seller or vendor of a horse said to the buyer, "You may depend that the horse is perfectly quiet and free from vice." This was regarded as an express warranty.

8. A mere representation is not a warranty. The relation between buyer and seller is not confidential. If the buyer, instead of requiring an explicit warranty, chooses to rely on the opinion of one who knows no more about the matter than he does himself, he can only blame himself for any loss that he may consequently sustain. In a case in which this principle was applied a buyer sought to recover for a loss occasioned in the purchase of coal. It was purchased at a price somewhat less at that time than that of first-class coal. The buyer complained that it contained an unusual percentage of slate and dirt, but the court declared that he got substantially the kind of coal for which he bargained. On another occasion an action was brought on a warranty by the purchaser of some goods that have been represented as fit for the China market. He produced a letter from the seller saying he had goods fit for the China market that he offered to sell cheap. The court declared that such a letter was not a warranty, but merely an invitation to trade, and that it had no specific reference to the goods actually bought by the buyer.

9. In one of the cases it was remarked that, if mere representations were to be treated as part of the contract, it would not be easy to see why they should not be thus treated in all contracts, and if they were the law would foster a spirit of litigation by encouraging every man who was disappointed in the advantages expected from a bargain to drown his sorrows by an appeal to the law. The law gives reparation for broken contracts, but it does not attempt to satisfy mere expectations. It is especially important that this should be the rule respecting representations of the quality of the goods sold, for there is nothing on which both are more apt to differ and less apt to trust each other.

10. An adulteration which is only partial, and does not destroy the distinctive character of a thing, is not sufficient ground, usually, for setting aside a contract of sale; the buyer is bound by the bargain. In doubtful cases the test seems to be that the article shall be marketable under the name affixed thereto by the seller. A case requiring the application of this principle related to the sale of teas. It was proved that they had been adulterated, but it was also proved that no teas of the same name or denomination were entirely free from adulteration by an admixture of leaves. The court remarked that, if a small degree of adulteration were permitted to affect the question of specific character, there would rarely be a binding sale. Wines are constantly adulterated with brandy, and brandy itself passes in the market, although often adulterated with alcohol. Drugs, chemicals, paints, dyestuffs, and a countless number of other commodities are constantly purchased by dealers

or commissioners while knowing that they are not entirely free from admixture. Adulteration may be carried so far as to destroy the distinctive character of the thing altogether, and in doubtful cases there is, perhaps, no particular test except that of its merchantable character. In the case described the teas were resold to dealers at prices not greatly reduced, although they were put on their guard by the buyer's repudiation of the article. The buyer, therefore, was not deceived with respect to the specific character of the teas, however mistaken he may have been concerning their quality.

11. The seller of goods actually in his possession as owner is regarded by the law as warranting his own title by the sale. But this rule does not apply to one who is acting for another—for example, an executor, administrator, or other trustee; or to a public officer. A sheriff knows nothing about the title of goods he may have seized by the direction of a creditor of a debtor.

12. In all sales of goods there is an implied warranty that the article delivered shall correspond in kind with the commodity sold, unless there are facts and circumstances to show that the purchaser took on himself the risk of determining, not only the quality of the article, but the kind he purchased. Therefore, should a person sell, and another buy, an article as blue paint, which is thus described in an itemised bill, this would constitute a warranty that the article delivered was blue paint, and not a different article.

13. Goods sold by sample are warranted to conform thereto in kind and quality, but there is no warranty of the sample itself. Thus, there was a sale of five

bags of hops with an express warranty that the others were like the samples. The sale was in January, and at that time the samples were essentially like the commodity sold. No defect at that time was perceptible to the buyer. In July every bag had begun to spoil by heating. The seller knew nothing of this fact at the time of the sale. The court decided that there was no implied warranty that the other bags or bulk of the commodity was merchantable at the time of the sale, although the market price was given.

In one of the later cases, in which this principle was applied, a salesman showed a can of corn to a person, who, after examining it, was asked to prove its quality by cooking it himself. On the following day he made an offer that was accepted by the buyer. There was no fraud and no warranty of the quality, and no facts showing that the parties intended that the quality should be precisely like that contained in the can that was examined and tested. Nothing was said or done on either side to give character to the can as a standard of the quality. The court held that it was a standard only of the kind. The court remarked that, so long as a commodity is salable, its different degrees of quality from good to bad are not the subject of an implied warranty. A commodity that is wholly unmarketable is substantially different in kind from one that is not so. In such a case it is not the name merely that governs, but the fact that it is without market value and cannot reasonably be pronounced of the same kind as the sample.

14. There is an implied warranty that a thing ordered and supplied for a special purpose is fit for the purpose.

For example, a wine manufacturer applied to a rope dealer for a crane rope. The seller's foreman went to the buyer's premises to ascertain the kind of rope required. He examined the crane and the old rope, and was told for what purpose the new rope was wanted. The seller, however, did not make the rope himself, but sent the order to a manufacturer who employed a person to make it. It was decided that, as between the parties to the sale, there was an implied warranty that the rope should be fit for the purpose intended. The seller, therefore, was held responsible, not only for the rope, but for a loss caused by its use.

15. It has often been considered whether a bill of sale describing an article sold is a warranty that the article conforms to the description. The law is now well settled that such a description is a warranty. In one of these cases a bill of sale read thus: "H. and Co. bought of T. W. and Co. two cases indigo, $272." The article sold was not indigo, but Prussian blue. Fraud was not imputed to the seller, and the article was prepared in such a manner as to deceive exclusive dealers in indigo. The court regarded the bill of sale as a warranty that the article sold was indigo. In another case the bill read thus: "Sold E. T. H. two thousand gallons, prime quality, winter oil." The thing sold and actually delivered was oil, and winter oil, but not of prime quality. As in the other case, the court determined that the bill of sale constituted a warranty of that quality of oil. In another case a vessel was advertised for sale as "copper-fastened." This was decided to be a warranty that she was thus fastened as the term was understood by

ship-builders and merchants dealing in that kind of property.

16. Finally, it may be remarked that one who sells provisions is always regarded as warranting that they are good and wholesome.

17. If a warranty is defective the buyer cannot return the article sold, unless there be an agreement to that effect, or fraud; he can only sue the warrantor and recover money for the loss incurred. If, however, one orders a thing for a special purpose, known to the seller, he may return it as soon as its unfitness is found out.

18. Another remark may be added concerning the sale of one's business. In this country not infrequently such a sale is made, the seller agreeing or promising that he will not pursue his trade elsewhere. The contract is void whenever the seller agrees to give up his business and never to resume it again at any time or anywhere, without limitation of space or time, for it is against public interest to permit a man to cast himself out from his business or trade during the rest of his life. But a contract for a proper consideration not to resume or carry on business within a specified time or place is valid. What these limits are have not been clearly defined. A contract not to carry on a business in a specified town, city, or state would undoubtedly be good, even though the contract should exclude the seller from continuing his business in a considerable section of the country.

FORMS

Subscription to Build a Church Edifice

Whereas, the trustees of the church corporation, known as the "Church of the Puritans," are about erecting a church edifice for such corporation; now, we, the undersigned, for the purpose of such erection, hereby agree to and with such trustees and to and with each other, to pay to B. B., the treasurer of said corporation, the several sums by us set opposite our several names, for the purpose of such erection, and we hereby authorise and direct the said trustees to expend such sums in the erection of the same. The said sums are to be paid to the said treasurer on or before the 1st day of March, 1900.

NAMES	OUNT
A. B.....	$600
C. C.....	400

Subscription in the Form of a Contract

This memorandum of subscription agreement, made this .....day of....., in the year 19...., between ....., a corporation organised under the Membership Corporation Law of the State of New York (or, society, or, committee, as the case may be), party of the first part, and John Doe, and all other persons whose names are subscribed hereto, parties of the second part:

Whereas, the parties of the second part are desirous and deem it to their advantage to have a church building (or, whatever the object of the subscription may be) erected at ....., in the county of....., State of ....., and the party of the first part has agreed to erect said building at said place at a cost not to exceed the sum of.....dollars;

Now, this agreement witnesseth:

In consideration of the mutual and reciprocal obligations herein contained the parties hereto agree and stipulate as follows:

First. The party of the first part hereby agrees to erect, or cause to be erected, a church building at....., in the county of....., State of New York, according to plans and specifications to be approved by the board of trustees of the party of the first part (or, other persons, as the case may be), at a cost not to exceed the sum of..... dollars, and have the same ready for occupancy within .....years from the time the entire amount herein provided for is in good faith subscribed by the parties of the second part hereto, as hereinafter provided.

Second. The parties of the second part in consideration of the party of the first part undertaking to erect, or cause to be erected, the building, as specified in the foregoing paragraph of this agreement marked "First," hereby agree, and agrees, each for himself or herself, his or her heirs, executors, and administrators, to pay to the party of the first part the sums set opposite their respective names hereunto subscribed, on the dates and according to the terms herein expressed.

Third. It is further agreed, that this contract shall not be binding on either party hereto until at least the sum of .....dollars is subscribed, provided, however, that neither the party of the first part nor any party of the second part shall have power to cancel this agreement as to it, him, or her, prior to the.....day of....., 19...., it being the object of this proviso that the parties hereto shall have until said date to secure subscriptions amounting to the entire sum of.....dollars; and if subscriptions for such sum is secured not later than said.....day of ....., 19...., none of the parties hereto shall have power in any event to cancel this agreement as to it, him, or her.

Fourth. It is further agreed, that if the entire sum of .....dollars is not subscribed on or before the..... day of....., 19...., then any party hereto shall have power to cancel this contract as to it, him, or her, by giving a written notice, personally or by mail, of its, his, or her intention so to do; if by the party of the first part to each of the parties of the second part, addressed to him or her at his or her last ascertainable post-office address; if by any

party of the second part, by giving a like notice to the board of trustees of the party of the first part.

Fifth. It is further agreed, that within..... days from the time the total amount of.....dollars, as herein provided, is subscribed, the party of the first part can call for the payment of at least 25 per cent. of the respective subscription made by the parties of the second part hereto, and may call for any part, or the whole, of the remainder thereof at any time after.....months from the first call, as hereinbefore provided.

In witness whereof, the party of the first part has caused this instrument to be subscribed in its corporate name and its seal to be hereto affixed, and the parties of the second part have hereto set their respective hands and seals and the amounts and dates of their subscriptions.

NAMES	DATES	AMOUNTS
	(L.S.)	
	(L.S.)	
	(L.S.)	
	(L.S.)	

(If the subscription is to support a pastor, the agreement may be put in the form of an undertaking on the part of the corporation, society, or committee, to secure to the pastor the sum agreed upon, the subscribers agreeing to reimburse the corporation, society, or committee in the sum which each subscribes. In any event, to be binding, the subscription should be in the form of an undertaking on the part of the corporation, society, or committee, to which the payment is to be made directly to do some act which is the consideration for the subscription. The form given above can be easily changed to meet the various requirements of such documents.)

Bill of Sale

Know all men by these presents, that....., of the first part, for and in consideration of the sum of.....,

lawful money of the United States, to.....in hand paid, at or before the ensealing and delivery of these presents by....., of the second part, the receipt whereof is hereby acknowledged, ha....bargained and sold, and by these presents do grant and convey, unto the said part..... of the second part, ...executors, administrators, and assigns (description of property; or if detailed description is contained in schedule annexed, say, the goods and chattels particularly described in a schedule hereunto annexed and made a part of this instrument), to have and to hold the same unto the said part..... of the second part, ... executors, administrators, and assigns forever. And..... do.... for.....heirs, executors, administrators, covenant and agree, to and with the said part..... of the second part, to warrant and defend the sale of the said property .....hereby sold unto the said part..... of the second part, ...executors, administrators, and assigns, against all and every person and persons whomsoever.

In witness whereof, ...have hereunto set .....hand.....and seal ..... the..... day of....., in the year one thousand nine hundred and.....

Sealed and delivered in the presence of

(Acknowledgment clause.)

Agreement for Building

Articles of agreement, made this.....day of....., 19...., between....., of the first part, and ....., of the second part.

First. The said part..... of the second part do.... hereby, for.....heirs, executors, administrators, covenant, promise, and agree to and with the said part..... of the first part, ...executors, administrators, or assigns, that....., the said part..... of the second part, ...executors, administrators, shall and will, for the consideration hereinafter mentioned, on or before the ....., well and sufficiently erect and finish

the new building....., agreeable to the drawings and specifications made by.....and signed by the said parties and hereunto annexed, within the time aforesaid, in a good, workmanlike, and substantial manner, to the satisfaction, and under the direction of the said..... ....., to be testified by a writing or certificate under the hand of the said....., and also shall and will find and provide such good, proper, and sufficient materials, of all kinds whatsoever, as shall be proper and sufficient for the completing and finishing all the....., and other works of the said building.. mentioned in the..... specification.., for the sum of..... And the said part..... of the first part do.... hereby, for....., heirs, executors, and administrators, covenant, promise, and agree, to and with the said part..... of the second part, ..., executors and administrators, that..... ....., the said part.... of the first part, ... executors, or administrators, shall and will, in consideration of the covenants and agreements being strictly performed and kept by the said part.... of the second part, as specified, well and truly pay, or cause to be paid, unto the said part.... of the second part, ...executors, administrators, or assigns, the sum of.....dollars, lawful money of the United States of America, ... in manner following: .....provided, that in each of the said cases, a certificate shall be obtained and signed by the said.....

And it is hereby further agreed by and between the said parties:

First. The specifications, conditions, and the drawings are intended to co-operate, so that any works exhibited in the drawings and conditions, and not mentioned in the specifications, or vice versa, are to be executed the same as if it were mentioned in the specifications and set forth in the drawings, to the true meaning and intention of the said drawings, conditions, and specifications, without extra charge whatsoever. The specifications, drawings, and conditions are hereby made a part hereof.

Second. The contractor, at his own proper costs and charges, is to provide all manner of materials and labour, scaffolding, implements, moulds, models, and cartage of

every description, for the due performance of the several erections.

Third. Should the owner, at any time during the progress of the said building.... request any alteration, deviation, additions or omissions, from the said contract, he shall be at liberty to do so, and the same shall in no way affect or make void the contract, but will be added to or deducted from the amount of the contract, as the case may be, by a fair and reasonable valuation.

Fourth. Should the contractor, at any time during the progress of the said works, refuse or neglect to supply a sufficiency of materials or workmen, the owner shall have the power to provide materials and workmen, after three days' notice in writing being given to finish the said works, and the expense shall be deducted from the amount of the contract.

Fifth. Should any dispute arise respecting the true construction or meaning of the drawings or specifications, the same shall be decided by....., and..... decision shall be final and conclusive; but should any dispute arise respecting the true value of the extra work, or of the works omitted, the same shall be valued by two competent persons...., one employed by the owner, and the other by the contractor....and those who shall have the power to name an umpire, whose decision shall be binding on all parties.

Sixth. The owner shall not, in any manner, be answerable or accountable for any loss or damage that shall or may happen to the said works, or any parts thereof respectively, or for any of the materials or other things used and employed in finishing and completing the same (loss or damage by fire excepted).

Seventh. The contractors, and each of them, to be responsible for each and every violation of the city ordinances caused by the obstruction of streets and sidewalks, and shall hold the owner harmless from any and all damages or expense arising therefrom; said contractors, and each of them, shall be responsible for, and shall save and keep the owner harmless and indemnified from and against all liability by reason of injury or damage to person or property in consequence of obstructions of the street or sidewalk, or of any materials or

other thing therein or thereon, if any, and from any excavation or want of light or other proper guard or warning.

Eighth. The contractors, and each of them, to take all necessary and proper steps to make, and to properly, carefully, and skilfully make all excavations without injury to adjoining buildings and property, and to save and keep the owner harmless and indemnify him from and against all liability and damage by reason of excavations, if any, and failure to properly, carefully and skilfully make the same, and to properly, carefully, and skilfully do and perform all the work contracted for.

Ninth. The contractors, and each of them, to save and keep the building referred to in this contract, and the lands on which it is situated free from any and all mechanics' liens, and other liens, by reason of his work or any material or other thing used therein; and if the contractors, or either of them, do not, the owner may retain sufficient of the contract price to pay the same, and all costs by reason of or in consequence thereof, and may pay said lien or liens, if any, and costs, and deduct the amount thereof from the contract price.

In witness whereof, the said parties to these presents have hereunto set their hands and seals, the day and year above written.

In presence of

(Acknowledgment clause.)

Notice of Mechanic's Lien

To....., the County Clerk of the County of....., ..., in the State of New York:

Take notice, that....., resident.... of the .....of....., in the county of..... ....., claimant.. ha.... a claim against....., of the .....of....., in said county of ....., for the sum of.....dollars, and interest from the .....day of....., 19...., for .....

That the name.. of the person.. by whom the claimant .....w.....employed and to whom....he

.....furnished.....such materials is.....

That the amount of the said labour and service performed and the materials.....furnished is as before stated; that the nature thereof is as follows:.....

That all the work for which this claim is made has..... been actually performed.....

That all materials for which this claim is made have..... been actually furnished.....

That the said labour and service have.....been performed, and such materials have been used and are to be used in erecting, altering, repairing, and improving the house.., building.., building lot.., premises, parcel, and farm of land and appurtenances to such house.., building.., and building lot.. situate upon the lot.., premises, parcel, and farm of land hereinafter described on.....street, in said.....of.....

That the first item of work done and materials furnished was performed and furnished on.....day of....., 19...., and the last item thereof on.....day of....., 19..... That ninety days have not elapsed since and after the ....., dating from the last item of work performed, and dating from the last item of material furnished.

That the name.. of the owner.., lessee.., general assignee.., or person.. in possession of the premises against whose interest a lien is claimed is.....

That such labour and services were performed, and such materials were furnished with the consent of said owner.., ..h.. agent and the contractor, subcontractor, and a person contracting with such owner.. to erect, alter, and improve such house.., building.....upon such lot, premises, parcel and farm of land.

That a description of the property to be charged with such lien is as follows:.....

The claimant.. ha.... and claim.. a lien, for the principal sum of.....dollars, ...and interest from the .....day of....., 19...., for the price and value of such labour and service and materials, upon such house.., building.., and appurtenances, and upon the lot, premises, parcel, and farm of land upon which the same stands.....pursuant to the statute in such case made and provided, to the extent of the right, title, and

interest at the time existing of such owner, whether owner in fee or of a less estate or whether a lessee for a term of years, or vendee in possession under a contract existing at the time of the filing of this notice of lien or of the owner of any right, title, or interest in such estate which may be sold under an execution under the general provisions of the statutes in force in the State of New York relating to liens of judgment and enforcement thereof, and also to the extent of the interest which the owner.. may have assigned by a general assignment for the benefit of creditors within thirty days prior to the time of filing this notice of lien and to the extent allowed by law.

.....County of....., *ss.:*

....., being sworn, says, ..he is.....the person.....making the foregoing claim, and that the statements therein contained are true to ....h.... knowledge of information and belief.

Subscribed and sworn to before me, this }
.....day of....., 19.... }